No. 91-946-CFX
Status: GRANTED

Title: Church of Scientology of California, Petitioner
v.
United States and Frank S. Zolin

Docketed:
December 9, 1991

Court: United States Court of Appeals for
the Ninth Circuit

Counsel for petitioner: Lieberman,Eric M.

Counsel for respondent: Solicitor General

Ptn mailed Dec. 9; recd Dec. 10, 1991

Entry	Date	Note	Proceedings and Orders
1	Dec 9 1991	G	Petition for writ of certiorari filed.
3	Jan 2 1992		Order extending time to file response to petition until February 8, 1992.
4	Feb 7 1992		Brief of respondent United states in opposition filed.
5	Feb 12 1992		DISTRIBUTED. February 28, 1992
6	Feb 14 1992	X	Reply brief of petitioner Church of Scientology of California filed.
7	Mar 2 1992		Petition GRANTED.
			**********
8	Mar 9 1992	G	Motion of petitioner to dispense with printing the joint appendix filed.
9	Mar 23 1992		Motion of petitioner to dispense with printing the joint appendix GRANTED.
11	Mar 25 1992		Order extending time to file brief of petitioner on the merits until May 1, 1992.
12	May 1 1992		Brief of petitioner Church of Scientology of California filed.
14	May 28 1992		Order extending time to file brief of respondent on the merits until June 17, 1992.
15	Jun 17 1992		Brief of respondent United States filed.
16	Jul 10 1992		CIRCULATED.
17	Jul 21 1992		SET FOR ARGUMENT TUESDAY, OCTOBER 6, 1992. (2ND CASE).
18	Jul 27 1992	X	Reply brief of petitioner filed.
19	Sep 28 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
20	Oct 6 1992		ARGUED.

No. 91-946

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA and FRANK S. ZOLIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: December 9, 1991

QUESTION PRESENTED

Whether the decision of the Court of Appeals—which conflicts with decisions of this Court and of other courts of appeals—was in error in dismissing petitioner's appeal as moot following compliance by a disinterested third party with an IRS summons enforcement order, although effectual relief remained available to the petitioner through return of documents and prohibition on the government's future use of the documents?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.1 LIST

The parties to the proceedings below were:

The Church of Scientology of California
United States of America
Frank S. Zolin

Petitioner Church of Scientology of California has no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-_____

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA and FRANK S. ZOLIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Church of Scientology of California ("the Church") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the court of appeals dismissing the appeal as moot (1a-2a) is unreported. The March 13, April 15, and May 21, 1991 orders of the district court (3a-11a) are unreported. A prior opinion and order of the Ninth Circuit (13a-15a), reported at 905 F.2d 1344 (9th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 1309 (1991), and the unreported order of the Ninth Circuit denying rehearing and a suggestion for rehearing *en banc* (12a), followed the remand from this Court in *United States* v. *Zolin*, 491 U.S. 554 (1989). The

order of the *en banc* court, issued prior to this Court's decision, vacating the order granting rehearing (18a-26a) is reported at 842 F.2d 1135. A subsequent concurrence to that order (16a-17a) is reported at 850 F.2d 610. The earlier order of the *en banc* court granting rehearing (27a) is reported at 832 F.2d 127. The initial opinion of the panel (28a-41a) is reported at 809 F.2d 1411. The April 30, 1985, order of the district court (44a-46a), and the June 10, 1985, order of the district court denying reconsideration (42a-43a) are unreported.

JURISDICTION

The final judgment of the court of appeals was entered on September 10, 1991 (1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the Constitution of the United States provides in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to Controversies to which the United States shall be a Party. . . ."

STATEMENT OF THE CASE

1. The MCCS tapes, which are the subject of this litigation, involve two confidential attorney-client conversations held in July 1980 between lawyers and representatives of the Church and of L. Ron Hubbard. The tapes were wrongfully obtained by Gerald Armstrong, a former adherent of the Scientology religion, in the early 1980's. *Zolin*, *supra*, 491 U.S. at 557. The tapes, along with thousands of other documents wrongfully in Armstrong's possession, were eventually ordered placed under seal in the custody of the Los Angeles County Superior Court in *Church of Scientology of California* v. *Armstrong* (No. C420153). *See Zolin*, 491 U.S. at 557. On October 24, 1984, the IRS served the subject summons on the Los Angeles County Clerk, who also serves as the Clerk of the Los Angeles County Superior Court, which summons sought production of numerous exhibits held under seal in the pending *Armstrong* case. *See id.* On November 21, 1984, the County Clerk complied with the IRS summons despite extant sealing orders, and made the tapes available to the IRS, which made copies, reviewed, and took notes of the tapes. *See id.*; E.R. 2-4.[1]

On November 27, 1984, the district court, in *Church of Scientology* v. *Armstrong*, No. CV 84-9003-HLH (C.D.Cal.), ordered the IRS to place the copies of the tapes and any notes made from the tapes in the custody of the district court, because the County Clerk had erroneously and improperly made the sealed tapes available to the IRS (47a-49a); *Zolin*, 491 U.S. at 557-58; E.R. 15-17. The government did not argue at that time that the County Clerk's compliance with the summons made the Church's proceeding for the return of the tapes moot. The IRS complied with the district court's order on or about November 29, 1984 (48a); E.R. 4. The original tapes remained under seal in the custody of the Superior Court, and on January 22, 1985, the district court ordered that the copies and notes also be returned to the Superior Court's custody (47a-49a).

2. On January 18, 1985, the government commenced this proceeding, pursuant to 26 U.S.C. §§ 7402, 7602 and 7604, by filing a petition in the district court to enforce the October 24, 1984, summons served upon the Los Angeles County Clerk (29a); *Zolin*, 491 U.S. at 558; E.R. 1-6. The Church and Mary Sue Hubbard intervened in the district court to oppose enforcement of the summons, on the ground relevant here, that the MCCS tapes are protected by the attorney-client privilege (18a). The government asserted that the crime-fraud exception to the privilege applied to the MCCS tapes.

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1 "E.R." refers to Appellant's Excerpts of Record filed by the Church in the court below.

The key issue throughout this litigation has been whether a seventeen-page partial transcript of the tapes obtained by the IRS could be considered in determining the crime-fraud question, and if so, whether the exception was established. This issue was extensively litigated in the district court (42a-46a), in the court of appeals (16a-41a) and this Court, *Zolin*, 491 U.S. 554.

In establishing standards for determination of the crime-fraud exception, this Court held:

> Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

Zolin, 491 U.S. at 572 (internal quotations and citations omitted). This Court further held that "the threshold showing to obtain *in camera* review may be met by using any relevant evidence, *lawfully obtained*, that has not been adjudicated to be privileged." *Id.* at 575 (emphasis added). This Court noted that whether the partial transcripts in this case were *lawfully obtained* remained an open question. *Id.* at 559 n.5. The Church had attempted to raise the question how the government had obtained the partial transcript (*i.e.*, legally or illegally) in the initial proceedings in the district court. The court, however, precluded the Church from presenting evidence on this issue because it (erroneously) found this issue to be irrelevant, E.R. 26-34, and then ruled in the Church's favor on the merits of the crime-fraud issue *after* reviewing the partial transcript.

3. On remand from this Court, the court below reviewed the partial transcript and held that it "appear[ed] to" establish the crime-fraud exception (15a). The court then stated, "On remand the district court should admit the MCCS tapes into evidence, subject to any objections the parties might make at that time." (15a).[2] In a footnote to this explicit statement that the Church could make further objections on remand, the court below specifically noted that *it* had not reached the issue whether the transcripts were lawfully obtained because "[t]he Church did not raise this issue in its original appeal" (15a n.2). The court below was apparently confused about the procedural posture of the case, as the Church had *prevailed* on the tapes issue in the district court; the *government* had appealed the decision, *not* the Church. In any event, nothing in the court's decision could reasonably be read to preclude the *district court* from resolving an issue that the Church *had* raised, but which the district court had refused to address, erroneously believing it to be irrelevant, and which was, in any event, unnecessary to the district court's original decision.

The Church's petition for rehearing and suggestion for rehearing *en banc* was denied on September 19, 1990 (12a). Its petition for writ of certiorari was denied by this Court on March 18, 1991. *See Church of Scientology of California* v. *United States*, ____ U.S. ____, 111 S.Ct. 1309 (1991).

4. On January 14, 1991, while the Church's petition for a writ of certiorari was *sub judice* in this Court, the government moved, without notice to the Church's attorneys, in the district court for access to the MCCS tapes. E.R. 74, item 58. On January 17, the district court ordered that the tapes in the possession of the Superior Court be made available for inspection and copying by the government. E.R. 40-41. On January 23, 1991, the government obtained an *ex parte* order from the County Superior Court, which ordered the County Clerk to comply with the district court's enforcement order. E.R. 42-43. That same day, the County Clerk made the tapes available to the government, which then made copies of the tapes.

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2 There is in fact no proceeding into which the tapes may be admitted. This is merely a summons enforcement proceeding, in which the IRS has sought access to the tapes, not to admit them into any proceeding.

The Church did not learn of these *ex parte* proceedings until February 1, 1991. The Church then moved for return of the tapes on the grounds that: 1) the district court's April 30, 1985 stay order remained in effect (45a-46a); 2) the government had failed to give the Church notice of its attempt to obtain the tapes on January 14, 1991; and 3) several important issues remained for resolution on remand. On March 13, 1991, the district court agreed with the Church and ordered that any copies of the tapes and any notes or transcripts in the possession of the government be returned to the district court (7a-8a, 11a). Shortly thereafter, the government complied with that order. Again, the government did not argue that the case was moot on the ground that the County Clerk had fully complied with the district court's summons enforcement order.

In the district court, the Church opposed enforcement of the summons on three grounds: (1) the question whether the IRS obtained the partial transcript in a lawful manner remained to be decided, pursuant to the remand of this Court and the court of appeals; (2) testimony in January 1991 of the relevant IRS agents revealed that the investigation of the IRS' Criminal Investigation Division, pursuant to which the summons for the tapes was issued, had been terminated, and that the civil component of the IRS' tax examination of L. Ron Hubbard had been completed, and thus there remained no legitimate investigatory purpose for the summons, *see United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); 26 U.S.C. § 7602(a); and (3) the district court should review the contents of the tapes themselves to assure that their release would not violate the attorney-client privilege, consistent with the procedure urged by the three dissenting judges in the court of appeals' order vacating the court's prior order granting *en banc* review (24a-26a).

In its March 13 and May 21, 1991 orders, the district court refused to consider any of the Church's objections on their merits. Instead, it held that the court of appeals, although concededly not addressing any of these issues directly, had precluded the district court's consideration of them when it

resolved the attorney-client privilege issue (3a-4a, 8a-11a). Following this Court's denial of the Church's petition for a writ of certiorari on March 18, 1991, by order dated April 15, 1991, the district court ordered that the tapes be delivered to the IRS (5a-6a). The district court refused to stay its order pending appeal, but did grant a 21-day stay to permit the Church to seek a stay from the court of appeals (6a).

5. The Church filed a timely notice of appeal and sought a stay of the district court's order in the court of appeals on April 25, 1991. That court denied the Church's stay application on May 6, 1991. On May 8, 1991, Circuit Justice Sandra D. O'Connor denied the Church's application for a stay to this Court.

Following these denials, the Church moved on May 16, 1991, to expedite its appeal, which motion was granted on June 11, 1991. However, on May 21, the district court ordered that the government could obtain the copies of the tapes held by the district court (3a-4a), and on or about May 24 the government obtained those copies. On May 30, 1991, the court below denied the Church's renewed emergency motion for a stay pending appeal, and on May 31, 1991, it denied the Church's second renewed emergency motion for a stay pending appeal.

On May 30, the court below also ordered that the Church show cause why its appeal should not be dismissed as moot on the ground the IRS had acquired the tapes. The Church responded by explaining: 1) an appeal is not moot when the court can award the appellant effective relief, even if not precisely the relief originally sought, which was available here in the form of return of the tapes and prohibition on further disclosure of information obtained from the tapes; 2) several courts, including the Ninth Circuit, had either held or strongly indicated that compliance with an IRS summons by a disinterested third party does not moot an interested party's appeal; 3) a finding of mootness because of compliance with a summons was inconsistent with analogous decisions of the Ninth Circuit, the Supreme Court, and other courts of

appeals; and 4) the issues raised on appeal could not be resolved properly at some speculative future proceeding.[3]

By Order dated September 10, 1991, the court below held, "Because it is undisputed that the tapes have been turned over to the IRS in compliance with the summons enforcement order, no controversy exists presently and this appeal is moot. *See United States* v. *Kersting*, 891 F.2d 1407, 1410 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 49 (1990)" (2a). The order contained no further analysis or reasoning. The meritorious issues the Church raised in the district court and on appeal from the district court's order have never been addressed.

REASONS FOR GRANTING THE PETITION

The court below erred in dismissing petitioner's appeal as moot following disinterested third party compliance with an IRS summons enforcement order. First, it is well-settled that an appeal is not moot as long as a live, concrete controversy between adverse parties continues to exist and the court may grant any effectual relief, even if it is not the precise relief requested in the initial proceedings. The decision of the court below conflicts with decisions of this Court and of other courts of appeals that disclosure of documents to the government does not moot an appeal when, as here, relief in the form of return of documents and no further use of the documents remains available.

Second, there is a split in the courts of appeals whether compliance by a disinterested third party with an IRS summons enforcement order renders the appeal of the interested party moot. Such an appeal should not be held moot for several reasons: a live, concrete controversy remains between the

3 Pursuant to the court's expedited briefing schedule, the Church submitted its brief on the merits and excerpts of record on July 9, 1991, while the mootness issue was *sub judice*; the government never submitted its brief on the merits, originally due July 30, 1991, as the court did not rule on the government's request for an extension of time until it ruled on the mootness issue (2a).

interested parties, because erroneous IRS access to taxpayer documents may result in a variety of harms to the taxpayer; effective relief is available if the appellate courts determine that the district court order is erroneous; the right to appeal should not turn on the fortuity of the location of the documents; and the denial of the right to appeal an erroneous district court order undermines the taxpayer's protections created by Congress in summons enforcement proceedings. *See* 26 U.S.C. § 7609.

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OF COURTS OF APPEALS THAT AN APPEAL IS NOT MOOT WHEN EFFECTIVE RELIEF IS AVAILABLE

As this Court has recently reiterated, "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 110 S.Ct. 1249, 1253 (1990). " 'Simply stated, a case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979) (quoting *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969)); *see also DeFunis* v. *Odegaard*, 416 U.S. 312, 317 (1974) (case is moot when "[t]he controversy between the parties has . . . ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse legal interests' ") (quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-41 (1937)); *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 571 (1984) ("As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot. . . ."). "The burden of demonstrating mootness 'is a heavy one.' " *Davis*, 440 U.S. at 631 (quoting *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

Here, the controversy between the Church and the government over access to and use of the tapes remains "definite and concrete," and the parties clearly retain "adverse legal interests" on this issue. The government failed to meet its heavy burden of demonstrating mootness, and nothing in the

opinion below explains why there is no longer a "live" controversy between the parties.

In determining whether interim events have rendered an appeal moot, the federal courts do not limit their consideration to whether the precise relief originally sought is still available, but rather they determine whether an event has occurred "which renders it *impossible* for this court . . . to grant [a party] *any effectual relief whatever*." *Mills* v. *Green*, 159 U.S. 651, 653 (1895) (emphasis added). Although *Mills* is not of recent vintage, the courts of appeals continue to cite *Mills* for the principle that a case is not moot when there remains available "*any* effectual relief." *See, e.g., In re Stadium Management Corp.*, 895 F.2d 845, 848 (1st Cir. 1990); *Central States Pension Fund* v. *Central Transport, Inc.*, 841 F.2d 92, 95-96 (4th Cir. 1988); *Garcia* v. *Lawn*, 805 F.2d 1400, 1402 (9th Cir. 1986); *Jersey Central Power & Light Co.* v. *Township of Lacey*, 772 F.2d 1103, 1108 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1226 (6th Cir. 1985). As one commentary has stated, "decision should not be denied if a worthwhile remedy can be given"; *i.e.*, a case is not moot when the court has the "ability to undo the effects of conduct that was not prevented by the time of decision." 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3533.3, at 278-79 & n.36 (2d ed. 1984) (citing cases).

This well-settled doctrine that mootness does not turn on the availability of the precise relief originally requested is reflected in Fed. R. Civ. P. 54(c), which provides in pertinent part that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief* in his pleadings" (emphasis added). As one court has stated in rejecting an argument that a case was moot because the requested relief was no longer available, "The rule [54(c)] requires that a court ascertain whether the plaintiffs are entitled to *any* remedy, not whether they have asked for the proper remedy." *Kirby* v. *United States Government*, 745 F.2d 204, 207 (3d Cir. 1984) (emphasis original).

In *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), this Court applied the doctrine of the availability of any effectual relief in a situation remarkably similar to the instant controversy. In *Sells Engineering*, the respondents had sought to prevent the disclosure of grand jury materials to Justice Department Civil Division attorneys. After the district court and the court of appeals refused to stay disclosure,

> the Civil Division attorneys and their assistants *enjoyed access to the grand jury materials for more than two years* while this case was pending in the Court of Appeals. . . . The Government argued in the Court of Appeals that the case was moot because *the disclosure* sought to be prevented *had already occurred*.

Id. at 422 n.6 (emphasis added). Despite the disclosure, this Court held:

> The Court of Appeals correctly rejected the contention:
>
> "The controversy here is still a live one. By its terms the disclosure order grants access to all attorneys for the Civil Division, their paralegal and secretarial staff, and all other necessary assistants. Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but we can grant *partial relief by preventing further disclosure*." *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d, at 1187-1188.

463 U.S. at 422-23 n.6 (emphasis added).

Applying the principles of *Sells Engineering* and *Mills* here, it is clear that this case is not moot, "[s]ince effective relief may still be available if [the court of appeals] conclude[s] the district court's order was issued in error." *Pyramid Lake Paiute Tribe* v. *Hodel*, 882 F.2d 364, 369 (9th Cir. 1989). As in *Sells Engineering*, the court below may order that the tapes and any documents derived from the tapes be returned to the custody and control of the district court and that any infor-

mation derived therefrom not be further disclosed to any persons or otherwise used by the IRS, which would effectively return the parties to the *status quo ante*. While such relief is not "the precise relief sought" in the district court, *Pyramid Lake*, 882 F.2d at 368, it certainly is "effectual relief," *Mills*, 159 U.S. at 653, and "partial relief," *Sells Engineering*, 463 U.S. at 423 n.6, to which the Church, should it prevail on the merits, would be entitled. *Id.*

Indeed, *twice* previously in this case, the IRS has obtained access to the tapes following erroneous court orders, and both times the district court ordered the tapes and any notes or copies of the tapes returned to the custody and control of the district court (8a, 47a-49a). At no time did the government or the lower courts suggest that this court-authorized IRS access made the case moot or that return of the tapes did not constitute "effectual relief" merely because one could hypothesize various ways in which the *status quo ante* was not precisely restored. There is no principled reason why such relief, effective twice previously in this very case, would not constitute effectual relief now.

In addition to *Sells Engineering*, the lower courts have frequently held that when the government may have erroneously obtained documents through its subpoena power, the availability of the "effectual relief" of return of documents or of preventing further disclosures of documents to government officials prevents an appeal from being moot. *See, e.g., FTC* v. *Gibson Products of San Antonio, Inc.*, 569 F.2d 900, 903 (5th Cir. 1978) (appeal of order enforcing FTC subpoena *duces tecum* not moot despite compliance; "[i]f this case were decided in Gibson's favor, relief would be available by an order requiring the FTC to return the subpoenaed documents and to forbid use of the material in the adjudicatory hearing"); *FTC* v. *Browning*, 435 F.2d 96, 97 n.1 (D.C. Cir. 1970) (same); *Casey* v. *FTC*, 578 F.2d 793, 796 (9th Cir. 1978) (despite full compliance with FTC subpoena *duces tecum*, "[t]he possibility that we may yet afford the Union relief by preventing further disclosure or by requiring the FTC to return records wrongfully subpoenaed vests the

appeal with controversy sufficient to render the case justiciable"). There is, petitioner submits, no principled basis upon which to distinguish compliance with an FTC subpoena from compliance with an IRS summons enforcement order for purposes of a determination of mootness.

Similarly, in *In re Grand Jury Subpoena Dated June 5, 1985* (*Doe*), 825 F.2d 231 (9th Cir. 1987), attorney Doe, in response to a subpoena *duces tecum*, turned attorney-client documents over to the court for its review. The court then delivered the documents to the government, which presented them to the grand jury, which indicted the client Roe, but not Doe. The Ninth Circuit, relying on both its decision and this Court's decision in *Sells Engineering*, *supra*, held:

> The grand jury has not indicted Doe; the continued possession and control of the documents by the grand jury places Doe at risk of being indicted. *Cf. Sells*, 642 F.2d at 1187-88. . . . we can diminish this risk *by ordering the return of all of the documents. Sells*, 463 U.S. at 422 n.6 . . . . Under our reasoning in *Sells*, Doe's appeal is not moot.

825 F.2d at 235. The court in *Doe* distinguished Roe's appeal, holding that Roe's appeal was moot because Roe "has been indicted; we cannot unring that bell." *Id.* at 234 (internal quotations omitted).

Here, of course, no potential taxpayer targets of the IRS have been indicted or even have had civil proceedings initiated against them. They are in precisely the same position as Doe, who was permitted to pursue his appeal in the court of appeals even after the government had obtained and made use of the documents. *See also United States* v. *Fischbach and Moore, Inc.*, 776 F.2d 839, 841 n.2 (9th Cir. 1985) (disclosure of grand jury transcripts to civil litigants "does not render this appeal moot . . . because of harm caused by continuing disclosure") (citing *Sells Engineering*, 463 U.S. at 422 n.6)); *Cardwell* v. *Kurtz*, 765 F.2d 776, 779 (9th Cir. 1985) ("the district court's inability to effect complete relief . . . would not justify a refusal to grant as much relief as

possible—ordering the government to divest itself of the embodiment of the illegally seized information").[4]

II. THERE IS A DIRECT CONFLICT IN THE CIRCUITS WHETHER DISINTERESTED THIRD PARTY COMPLIANCE WITH AN IRS SUMMONS ENFORCEMENT ORDER RENDERS AN APPEAL MOOT

The decision of the court below also conflicts with decisions of the Third Circuit on the precise narrow issue presented here—whether compliance with an IRS summons enforcement order by a disinterested third party renders an appeal by the interested party moot.[5] In *Gluck* v. *United States*, 771 F.2d 750 (3d Cir. 1985), the Third Circuit held that full compliance with a summons enforcement order by the Franklin State Bank did not moot the appeal by the Glucks, the intervening taxpayers. The court reasoned that "the surrendering of the documents [by the Bank] to the IRS does not end the controversy *between the parties* because, if we find that the summonses were illegal, we can still fashion a remedy—prohibition of the use of the summoned documents—to afford the Glucks effective relief." *Id.* at 754

4 Under the statutory scheme created for IRS summons enforcement proceedings, there is no separate proceeding that the taxpayer can bring for return of documents. Thus, the live controversy here—whether the IRS has a right to possession and use of the MCCS tapes—cannot be litigated in any other forum and the government's argument that the precise relief sought by the Church here—return of the tapes—was not part of the *government's* enforcement proceeding to obtain the tapes rings especially hollow. Even assuming a separate proceeding were available, to require the Church to initiate such a separate proceeding and to relitigate the issues in the courts below would be a senseless waste of judicial resources.

5 The IRS summons in this case was directed against an indisputably disinterested third party—the Los Angeles County Clerk—not the taxpayer, L. Ron Hubbard, or an interested party such as petitioner herein. The County Clerk's disinterest in this proceeding is demonstrated by his failure to appear or to challenge the summons in any of the proceedings over the last six years in this Court, in the court below, or on remand to the district court.

(emphasis added); *see also United States* v. *Friedman*, 532 F.2d 928, 931 (3d Cir. 1976) (compliance by third parties with summons enforcement order does not moot taxpayer-intervenor's appeal); *United States* v. *Waltman*, 525 F.2d 371, 373 n.1 (3d Cir. 1975) ("Because a stay was denied, the diary was produced. However, the case is not moot since if the diary is not a corporate record, the individual respondent is entitled to its return and appropriate suppression of the use of its contents").

The court in *Gluck* noted that its "holding perpetuates the conflict between this court and most other courts of appeals that have considered the issue." *Id.* at 754 n.3 (citing cases). As that court recognized, however,

> It appears that some of these courts would nevertheless hold that this case is not moot given that compliance with the summons was carried out by someone other than the appellant, i.e., the bank. These courts distinguish between cases in which the summons is issued to the taxpayer/appellant and those in which it is issued to a third party where the taxpayer has intervened. They reason that it is unreasonable to expect *a disinterested third party* to resist a summons and risk contempt of court in order to keep a controversy live; thus they hold that *compliance by the third party does not moot the appeal.*

Id. (emphasis added).

In *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980), for example, the summoned third party, a large accounting firm, had a strong financial incentive to resist the summons.[6] The First

6 The First Circuit stated that, "although Andersen is not the immediate target of the IRS investigation, it has asserted strenuously that it is damaged by the disclosure of these work papers to the IRS. . . . This asserted interest provides sufficient incentive for Andersen to take all available steps to avoid disclosure." *Arthur Andersen*, 623 F.2d at 724.

Circuit held that in such circumstances, the *interested* third party must refuse disclosure and risk a contempt citation to preserve for appeal the issue of the validity of the underlying enforcement order. *Id.* at 724. The court, however, explicitly distinguished this situation from that of a *disinterested* third party: "It would be unreasonable to expect individuals with no strong interest in resisting the subpoenas to expose themselves to contempt by refusing to comply" in order to preserve the issues for appeal. *Id.* at 723-24.

Similarly, in *United States* v. *Kis*, 658 F.2d 526 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982), the court held that *taxpayer* compliance with an IRS summons moots the taxpayer's appeal. *Id.* at 534. The court, however, explicitly distinguished that case from *In re Special April 1977 Grand Jury*, 581 F.2d 589 (7th Cir.), *cert. denied*, 439 U.S. 1046 (1978), in which an appeal of a denial of a motion to quash grand jury subpoenas *duces tecum* was held not moot because compliance had been by *disinterested* third parties. *Kis*, 658 F.2d at 534. As the court in *Kis* stated in distinguishing its prior decision, "the subpoenas were directed at members of the staff of appellant . . . , not to [appellant] himself. It would have been unreasonable to require those staff members, who had *no personal interest in resisting* the subpoenas, to expose themselves to contempt by refusing to comply." *Id.* (emphasis added); *see also United States* v. *Barrett*, 837 F.2d 1341, 1346 (5th Cir. 1988) ("once an individual complies with a summons enforcement order, *that person* is precluded from appealing any issues that attack the validity of the district court's decision to enforce the summons") (emphasis added), *cert. denied*, 492 U.S. 926 (1989).

Indeed, the court below recently stated its view that compliance with an IRS summons by a *disinterested* third party does not moot an appeal by an interested intervenor. In *Kersting*, *supra*, the IRS issued a summons to Kersting, who promoted tax shelters, in order to identify taxpayers participating in his investment. 891 F.2d at 1408-09. The taxpayers intervened in the proceedings. *Id.* at 1410. Kersting vigorously contested the summons, and was held in contempt for

refusing to comply with the district court's enforcement order. *Id.* at 1409-10. On appeal, the court below was unable to determine if Kersting had ultimately complied with the summons enforcement order, but, in dictum, it stated that "[i]f he has so complied, his appeal of that order is moot." *Id.* at 1410.

The court of appeals also found that compliance by Kersting would moot the intervening taxpayers' appeal because Kersting was an *interested* third party with a clear and strong economic motive to resist the summons. *Id.* at 1411 & n.9 (citing *Arthur Andersen*, *supra*). The court recognized that *Arthur Andersen* "holds that whereas it is unreasonable to expect a *disinterested* third party to resist a summons at the risk of being held in contempt in order to protect the interests of those taxpayers whom the records concern, no such conclusion applies to interested third parties." *Kersting*, 891 F.2d at 1411 n.9 (emphasis original). Inexplicably, in dismissing the instant appeal as moot, the court below cited to *Kersting* without any discussion or analysis of *Kersting*'s explicit recognition that *disinterested* third party compliance should not render an interested intervenor's appeal moot (2a). Nor did the decision below contain any other analysis or reasoning to explain why this appeal should be considered moot.

Here, of course, the interested intervening party—the Church—has had absolutely no control over the materials at issue or the County Clerk's decision to comply with the summons. Indeed, neither the Church nor Mr. Hubbard placed the documents in the summoned party's possession, unlike most third party cases, in which the summons is directed at banks, attorneys, or accountants to whom the taxpayer voluntarily provided documents and financial information that the IRS subsequently sought. These are documents that never would have been in the Clerk's possession in the first place but for their conversion by Mr. Armstrong.

Unlike in *Kersting*, *Arthur Andersen* or *Kis*, the Church, as the interested party, is wholly without any power to prevent

compliance or to risk a civil contempt citation to preserve the enforcement issue for appeal. As those courts have recognized, it is patently unfair and unreasonable to hold that an otherwise live and concrete controversy between the parties is mooted by the actions of a disinterested party with no stake in the outcome. Because the Church, after extensive but ultimately unsuccessful efforts to obtain a stay in the district court, the court of appeals, and this Court (and after a successful motion to expedite the appeal), was unable to prevent compliance by the disinterested County Clerk with the summons enforcement order, the Church's appeal should not have been dismissed as moot. There is simply no logic to a rule of mootness and, hence, a taxpayer's right of appeal, that turns on the fortuity of the location of the summoned material.

Beyond the concerns of reasonableness and fairness identified in such cases as *Kersting*, *Kis*, and *Arthur Andersen*—which have special force here where the documents at issue were wrongfully obtained by Mr. Armstrong in the first instance—the distinction recognized in these cases between interested party and disinterested third party compliance is consistent with fundamental principles of mootness doctrine. Thus, when an interested party complies with a subpoena or summons, rather than risking contempt, the party demonstrates a lack of concern for the outcome of the enforcement proceeding and, in effect, concedes the absence of a "live" controversy and the definite and concrete adverse legal interests between the parties necessary for federal court jurisdiction. *See*, *e.g.*, *Davis*, *supra*, 440 U.S. at 631; *DeFunis*, *supra*, 416 U.S. at 317; *cf. Sibron* v. *New York*, 392 U.S. 40, 57 (1968) (holding appeal not moot; there has been no "suggestion that either Sibron or the State has been wanting in diligence or fervor in the litigation"). As the court in *Kis* explained, when a party has voluntarily chosen "to comply rather than risk a contempt citation . . . they cannot complain of the consequences now." 658 F.2d at 534. When a party does not have that option, however, and a definite and

concrete live controversy remains, as here, then an appeal is not moot.

Although a minority view, *Gluck* is clearly correct that a controversy remains between the *interested* party and the IRS and *effective* relief remains available even after the IRS obtains the summoned documents from a disinterested third party. Continuing access to and use of information to which the IRS has no right is indisputably a continuing harm. These harms include disclosure of the information to other government personnel, including to other government agencies; intrusive investigations based on the information obtained; and the increased risk of indictment and the need to defend in proceedings brought by the IRS based upon the information obtained. *See*, *e.g.*, *Sells Engineering*, 463 U.S. at 422 n.6; *Doe*, *supra*, 825 F.2d at 235; *Gluck*, 771 F.2d at 753-54.

Indeed, in *Sells Engineering*, this Court explicitly rejected the precise argument made by the government here that these continuing harms are not sufficient to keep a controversy alive:

> Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but we can grant partial relief by preventing further disclosure.

463 U.S. at 422 n.6.[7]

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7 The government's argument below—which directly contravenes this Court's holding in *Sells Engineering*—that such relief is ineffective after disclosure because the "cat is already out of the bag" is particularly specious in the context of this case. As noted, *supra*, the government has had access to the tapes on two earlier occasions and neither the government nor the courts ever suggested that this prior access rendered this case moot. Even if there might be cases in which the disclosure itself causes irreversible, irremediable harm, *see Gluck*, 771 F.2d at 754 (discussing *Vesco* v. *SEC*, 462 F.2d 1350, 1351 (3d Cir. 1972), in which the very act of surrendering documents gave rise to the alleged harm—criminal liability under Swiss bank secrecy law—which the federal courts had no power to cure), this is indisputably not such a case.

Those few courts that do purport to provide a rationale for finding that compliance by a disinterested third party with an IRS summons enforcement order moots an appeal rely on the possibility that the taxpayer might have an opportunity to challenge the admissibility of the summoned information at some hypothetical future proceeding brought by the IRS. *See, e.g., United States* v. *First American Bank*, 649 F.2d 288, 289 (5th Cir. 1981); *United States* v. *Trails End Motel, Inc.*, 657 F.2d 1169, 1170 (10th Cir. 1981); *Hintze* v. *IRS*, 879 F.2d 121, 125 (4th Cir. 1989).

The unspoken—and incorrect—assumption of these cases is that if the IRS ultimately does not commence criminal or civil tax proceedings, then no harm to the taxpayer is done. A necessary corollary of this assumption is that the taxpayer suffers no harm when the IRS has improper or unlawful access to the citizen's private papers; when it discloses them to other individuals; when it uses those papers to conduct a potentially intrusive and embarrassing investigation of a taxpayer; and when it brings a criminal or civil tax proceeding dependent on improperly obtained and ultimately suppressed documents.

Yet, in *Sells Engineering*, this Court rejected similar arguments, and made clear that the government's continuing use, possession, and disclosure of wrongfully obtained documents was itself a serious ongoing harm that constituted a live controversy over which the federal courts retained jurisdiction to fashion an appropriate remedy. As the court of appeals stated in *Sells Engineering*, "This action is a proper means to prevent future disclosure before it occurs; the availability of a motion to suppress in future civil proceedings" does not foreclose the Court's immediate consideration of the issues. *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d 1184, 1188 (9th Cir. 1981), *aff'd*, 463 U.S. 418, 422 n.6 (1983); *see also Gluck*, 771 F.2d at 753-54.

The courts that have rejected the Third Circuit's reasoning are simply incorrect in concluding that in resolving the substantive questions raised by the Church, the court below

would " 'give an advisory opinion as to the admissibility in evidence of the records or their product in the event of a subsequent criminal trial.' " *Barrett*, *supra*, 837 F.2d at 1346 (quoting *Lawhon* v. *United States*, 390 F.2d 663, 663 (5th Cir. 1968)). Rather, the court would be resolving a definite and concrete live controversy between adverse parties, which, if resolved in favor of the Church, could be remedied through return of the documents and a prohibition on any future disclosures or use of the information obtained. *See Sells Engineering*, 463 U.S. at 422 n.6; *Gluck*, 771 F.2d at 753-54. Congress, in enacting 26 U.S.C. § 7609, clearly determined that taxpayers must have the ability to prevent erroneous IRS access to documents held by disinterested third parties. It simply belies logic and common sense to conclude that those concerns dissipate at the moment of third party compliance with an *erroneous* district court order, so as to deprive the taxpayer of his right to appeal.

It is important to note that this Court has long recognized the need to construe jurisdictional requirements flexibly to preserve the rights of interested parties when the government seeks documents from disinterested third parties. In *Perlman* v. *United States*, 247 U.S. 7 (1918), for example, this Court relaxed the jurisdictional finality rule for appeals to permit the appellant, who otherwise "was powerless to avert the mischief of the order," *id.* at 13, to raise a claim of privilege in response to an order directed to a third party requesting certain documents. "The Court [in *Perlman*] held an order compelling production was appealable because *it was unlikely that the third party would risk a contempt citation* in order to allow immediate review of the appellant's claim of privilege." *United States* v. *Nixon*, 418 U.S. 683, 691 (1974) (emphasis added) (citing *Perlman*, 247 U.S. at 12-13); *see United States* v. *Ryan*, 402 U.S. 530, 533 (1971); *In re Grand Jury Subpoena*, 926 F.2d 1423, 1430 n.4 (5th Cir. 1991); *Kis*, *supra*, 658 F.2d at 534; *In re Grand Jury Proceedings in Matter of Fine*, 641 F.2d 199, 201-02 (5th Cir. 1981) (citing cases). The identical considerations apply here to prevent the Church's appeal from being dismissed as moot.

Similarly, Congress expressly provided an interested party with the right to notice and to intervene to prevent disinterested third party compliance with an IRS summons prior to judicial resolution. *See* 26 U.S.C. § 7609(a),(b). Nothing in the statute evinces a congressional intent to limit such judicial review solely to the district court, whether its order is erroneous or not. Indeed, 26 U.S.C. § 7609(h)(1) expressly provides that "[a]n order denying the [taxpayer's] petition [to quash a summons] shall be deemed a final order which may be appealed." The consistent practice of the district courts and the courts of appeals, however, has been to deny stays following the issuance of a summons enforcement order to disinterested third parties, as occurred below. The effect of such denials, when combined with holding the interested party's appeal moot following third party compliance, is not only to deny consideration of a potentially meritorious appeal, but to undermine the rationale of *Perlman* and to render the procedural protections created by Congress in 26 U.S.C. § 7609 a nullity for any taxpayer who does not prevail initially in the district court.

Finally, the Church emphasizes that permitting its meritorious appeal to go forward will not interfere with the IRS' tax collection functions. The IRS has the tapes and can use them as it sees fit unless and until the court of appeals orders otherwise. If the district court order is determined to be erroneous, certainly there is no conceivable injustice in requiring that the IRS make no further use of the tapes. By contrast, both congressionally authorized taxpayer intervention, pursuant to 26 U.S.C. § 7609, and the court-approved practice in which the interested party preserves his right to appeal by refusing to comply with an enforcement order and then submitting to a contempt proceeding, substantially delay IRS access to summoned documents, and thus have far greater impact on the IRS' pursuit of tax revenues than permitting an appeal following disinterested third party compliance with a summons enforcement order.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Dated: New York, New York
December 9, 1991

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-55506
D.C. No. CV-85-0440-HLH
(Central California)
Sept. 10, 1991

UNITED STATES OF AMERICA,

Petitioner-Appellee,

v.

FRANK ZOLIN,

Respondent,

and

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Intervenor-Appellant.

Before:

SNEED, SCHROEDER, and CANBY,

Circuit Judges.

ORDER

On May 30, 1991, this court issued an order to show cause why this appeal should not be dismissed as moot because the tapes that are the subject of this appeal had already been released to the Internal Revenue Service (IRS). Appellant

filed a response to the order to show cause, appellee filed an opposition to appellant's response, and appellant then filed a reply.

Because it is undisputed that the tapes have been turned over to the IRS in compliance with the summons enforcement order, no controversy exists presently and this appeal is moot. *See United States* v. *Kersting*, 891 F.2d 1407, 1410 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 49 (1990). Accordingly, this appeal is dismissed.

Appellee's June 24, 1991 "Objection to Order to Expedite Appeal and Motion to Stay Briefing Schedule" and its July 23, 1991 alternative renewed motion for a stay of the briefing schedule or for an extension of time to file its answering brief are denied as moot.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 85-0440-HLH

UNITED STATES OF AMERICA

v.

FRANK ZOLIN; CHURCH OF SCIENTOLOGY,

Intervenor.

CIVIL MINUTES—GENERAL

Date May 21, 1991

PRESENT: HON. HARRY L. HUPP, *Judge*

PROCEEDINGS: Order Regarding Delivery of MCCS Tapes

ORDER

The court has considered Intervenor's objections to the Ex Parte Application for delivery of the MCCS tapes.

Intervenor requests that the court listen to the tapes and make its own findings as to whether the crime-fraud exception to the attorney client privilege applies. Since the Court

of Appeals has decided this question adversely to Intervenor, there is no point in this court doing an idle act.

Intervenor also requests that the same paragraph regarding non-delivery of the tapes to other government agencies (unless the matter is referred for criminal proceedings, now apparently a moot question) be included in this order as was contained in the original order and affirmed by the Court of Appeals. This paragraph was originally requested because Intervenor was concerned that material obtained by the special processes of the IRS would find its way [into] civil litigation with the government not involving taxes. A similar order appears appropriate here; thus Intervenor's form of order (deleting the last sentence as beyond the purpose of the order) is signed and filed this date.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 85-0440-HLH

UNITED STATES OF AMERICA

v.

FRANK S. ZOLIN

CIVIL MINUTES—GENERAL

Date April 15, 1991

PRESENT: HON. HARRY L. HUPP, *Judge*

ATTORNEYS PRESENT FOR PETITIONER:
EDWARD M. ROBBINS

ATTORNEYS PRESENT FOR INTERVENOR:
JOHN J. QUINN
ERIC M. LIEBERMAN

PROCEEDINGS: Petitioner's Motion for Return of the MCCS Tapes

ORDER

The government's motion for an order requiring the MCCS tapes, now in the possession of the clerk of this court, to be delivered to the IRS, is granted. This order is stayed for 21 days to allow the intervenor to seek from the Court of Appeals a stay pending appeal. This minute order is the court's final order on the subject; no more formal order is required.

The intervenor cannot win in this court a case which it lost in the Supreme Court and the Court of Appeals.

The court declines to reconsider its minute order of 3/13/91, which it considers to be correct.

Under the minute order of 3/13/91, upon denial of certiorari (as occurred on 3/18/91), all conditions for delivery of the tapes to the government were satisfied. The court is not inclined to reconsider its previous rulings in the matter. Litigation must end sometime, although one would not learn that lesson from this case.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 85-0440-HLH

UNITED STATES OF AMERICA

v.

FRANK ZOLIN

CIVIL MINUTES—GENERAL

Date March 13, 1991

PRESENT: HON. HARRY L. HUPP, *Judge*

ATTORNEYS PRESENT FOR PETITIONER:
EDWARD M. ROBBINS

ATTORNEYS PRESENT FOR INTERVENOR:
JOHN J. QUINN
EARL C. COOLEY

PROCEEDINGS: MOTION TO VACATE MINUTE ORDER

ORDER

The application of Intervenor Church of Scientology to vacate this court's order of 1/17/91 and to reinstate the stay order of 4/30/85 is granted in part as set forth below. The MCCS tapes are to be delivered to the clerk of this court and kept sealed until further order of this court. The court expects to order deliver of the material to the IRS on the conditions set forth below.

At the time the order of 1/17/91 was made, the court believed that the Church had been notified of the application and was unaware that certiorari had been applied for following the most recent decision of the Court of Appeals. The order would not have been entered at all had the court known that notice had not been given the Church. The court would have asked counsel's views on whether the stay should be continued in effect pending ruling on certiorari. The court finds that the Church did not receive notice by reason of the negligence of plaintiff in failing to see that proper notice was given (i.e., failing to note that one attorney had died and another had given notice of change of address years before).

In view of the decision of the Court of Appeals, which the court believes is at least ambiguous in certain respects (i.e., the direction to receive the tapes in evidence may evidence a misunderstanding of what this case was about), the court believes that the previous stay of delivery of the MCCS tapes should remain in effect until the Petition for Certiorari is ruled upon (and to decision by the Supreme Court, if granted).

The court finds the other argument by the Church—that the issue of the illegality of the acquisition of the partial transcripts is still alive—to be without merit, or, at any rate, not open to determination by this court. The effect of the holding of the Court of Appeals must be analyzed. The Court of Appeals determined (as a matter that is at least partially factual) that the Church was not entitled to the privilege because the crime-fraud exception applied. In doing so, the Court of Appeals apparently erroneously assumed that this determination was necessary to decide whether the tapes were admissible in some proceeding. It reserved to this court all other objections. The Court of Appeals apparently never realized that it was deciding the only relevant question, and that no other valid objections exist once that question was decided. This is because determination of the illegality question was a preliminary step before the transcripts could be analyzed to determine if the crime-fraud exception applied. When the Court of Appeals decided that the crime-fraud exception to the privilege applies, the preliminary determinations to the making of that determination have already been decided (or erroneously not decided, but that is not for this court to say). The consequences of the method of attack on the problem laid down by the Supreme Court must be recognized. Illegality of the method of obtaining the partial transcripts is a preliminary question to the next step in the procedure—deciding whether the court may make an in camera inspection of the allegedly privileged materials. Since that (and other) preliminary questions are subsumed by the decision on the ultimate issue (i.e., whether the crime-fraud exception applies), the decision of the Court of Appeals that the exception applies leaves this court nothing to do by way of making preliminary determinations to the decision of the ultimate question. Thus, it is not open to this court on the present state of the record as left by the Court of Appeals to make any determinations that are preliminary to the decision of the question of whether the crime-fraud exception applies.

It does seem possible that the Court of Appeals was under some misunderstanding of the issues. The mandate to receive the tapes into evidence "subject to any objections the parties might make at that time" seems to assume that there are questions pending other than whether the crime-fraud exception obviates application of the attorney-client privilege. There are not. All other issues have long since been determined. If there is no privilege by reason of the crime-fraud exception, the summons must be enforced and the tapes delivered to the IRS. The Church apparently argues that the question of illegality of the method of obtaining the partial transcripts is a question separate and apart from the question

of the applicability of the crime-fraud exception. It is not. It is merely a preliminary question to whether the court should go into an in camera review of the allegedly privileged material to determine whether the crime-fraud exception applies. Once the determination is made that the crime-fraud exception applies (and whatever other misunderstanding the Court of Appeals may have had, there is no question that it intended to determine that), then all preliminary questions are subsumed. It also seems possible from another clue that the Court of Appeals mistook the place of the illegality issue. It noted that it had not reached that issue because it had not been raised on that appeal. The reason it was not raised is apparent; this court did not decide it, holding that it could not look at the transcripts themselves. Thus, the issue was never presented to the court and the only reason it was briefed to this court at all was for the court to determine that the partial transcripts were not obtained in violation of this court's orders (which was determined). The question of the method of obtaining the partial transcripts did not become otherwise relevant until the Supreme Court made it so as a matter for determination as to whether the court could read the allegedly privileged material. The Court of Appeals subsumed this issue when it read and made determinations from the transcripts.

If the Court of Appeals is deciding any part of the issue (i.e., if the partial transcripts could be considered, what the effect is) but *not* whether the transcripts may be read, then they certainly did not say so. Absent that, there is nothing for this court to do before ordering the transcripts delivered to the IRS than await the Supreme Court's decision on certiorari.

The problem has been raised with this court by the intervenors that this entire proceeding is moot because L. Ron Hubbard has died, thereby foreclosing the possibility of any further investigation of Hubbard's potential criminal tax liability. While it is true that there can be no further investigation of any criminal tax liability, it does not follow that the government has absolutely no use for the MCCS tapes. The reason for this is because the tax investigation of Hubbard

entails civil elements which have survived his death. (*See Author Services* 9Cir'86 804 F.2d 1520, 1522 n.1; *Zolin* 9Cir'87 809 F.2d 1411; *Zolin* '89 105 L.Ed.2d 469, 481 n.3) This proceeding, then, is not moot.

The court understands from the parties that all copies of the tapes, and any notes or transcripts therefore, have been delivered to the U.S. Attorney. They are now to be delivered to the clerk of the court and sealed. Counsel for the Church to prepare form of order, seek approval as to form from the plaintiff, and lodge the same with this court. This minute order contains the court's factual determinations and reasoning, which need not be repeated in the order.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065, 85-6105
D.C. No. CV85-440-HLH
(Central California)

Sept. 19, 1990

UNITED STATES OF AMERICA,
Petitioner/Appellee/Cross-Appellant,

v.

FRANK S. ZOLIN,
Respondent-Appellee,

and

CHURCH OF SCIENTOLOGY OF CALIFORNIA, and
MARY SUE HUBBARD,
Intervenors/Appellants/Cross-Appellees.

Before:

GOODWIN, Chief Judge, BROWNING,
and FARRIS, Circuit Judges.

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065, 85-6105

June 20, 1990

UNITED STATES OF AMERICA,
Petitioner/Appellee/Cross-Appellant,

v.

FRANK S. ZOLIN,
Respondent-Appellee,

and

CHURCH OF SCIENTOLOGY OF CALIFORNIA, and
MARY SUE HUBBARD,
Intervenors/Appellants/Cross-Appellees.

On Remand from the United States Supreme Court.

Before:

GOODWIN, Chief Judge,
BROWNING, and FARRIS, Circuit Judges.

FARRIS, *Circuit Judge*:

The facts of this case are set forth in our previous opinion, *United States v. Zolin*, 809 F.2d 1411 (9th Cir. 1987), *aff'd in part and vacated in part*, ____ U.S. ____, 109 S.Ct. 2619,

105 L.Ed.2d 469 (1989). We now resolve whether tapes of two meetings of the Mission Corporate Category Sortout project are admissible under the crime-fraud exception to the attorney-client privilege in light of the Supreme Court's ruling in *United States v. Zolin*, ____ U.S. ____, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989). We hold that the tapes are admissible.

"To invoke the [crime-fraud] exception successfully the party seeking disclosure . . . must make out a prima facie case that the attorney was retained in order to promote intended or continuing criminal or fraudulent activity." *United States v. Hodge & Zweig*, 548 F.2d 1347, 1353, 1354 (9th Cir. 1977). The Government has presented the following evidence of intended illegality: (1) Agent Petersell's Supplemental Declaration of March 8, 1985, (2) Petersell's Supplemental Declaration of March 15, 1985, and (3) partial transcripts of the tapes themselves.[1]

In our first *Zolin* opinion we examined only the independent evidence presented—items one and two above—and held that "while not altogether insubstantial, [this evidence] is not sufficient to make out the requisite prima facie showing of intended illegality." 809 F.2d at 1419. In its decision, the Supreme Court held that

> evidence that is not "independent" of the contents of allegedly privileged communications—like the partial transcripts in this case—may be used not only in the pursuit of *in camera* review, but also may provide the evidentiary basis for the ultimate showing that the crime-fraud exception applies.

Zolin, 109 S.Ct. at 2632 n. 12. We must therefore examine the transcripts and determine whether they, along with the independent evidence already reviewed, demonstrate sufficient evidence of intended illegality to establish that the tapes are within the crime-fraud exception. We hold that they do.

1 The Government has also attempted to present the declaration of Agent Philip Xanthos as evidence, but we have already denied the Government permission to present this declaration and will not consider it here. *See* March 3, 1987 Order.

The partial transcripts demonstrate that the purpose of the MCCS project was to cover up past criminal wrong-doing. The MCCS project involved the discussion and planning of future frauds against the IRS, in violation of 18 U.S.C. § 371. *See, e.g., United States v. Carruth*, 699 F.2d 1017, 1021 (9th Cir. 1983), *cert. denied*, 464 U.S. 1038, 104 S.Ct. 698, 79 L.Ed.2d 164 (1984). The figures involved in MCCS admit on the tapes that they are attempting to confuse and defraud the U.S. Government. The purpose of the crime-fraud exception is to exclude such transactions from the protection of the attorney-client privilege.

We therefore reject the district court's holding that the Government did not make out a case of intended illegality. In light of the Supreme Court's holding that the tapes themselves can be examined for proof that would establish the crime-fraud exception, the transcripts can be examined, and they appear to make out the Government's case on intended illegality. On remand the district court should admit the MCCS tapes into evidence, subject to any objections the parties might make at that time.[2]

REVERSED AND REMANDED.

2 The issue of the potential illegality of the transcripts, mentioned by the Supreme Court, *see Zolin*, 109 S.Ct. at 2624 n. 5, is not properly before this court. The Church did not raise this issue in its original appeal, and we will not consider it on a later remand. *See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1547-48 (9th Cir. 1988).

APPENDIX G

Order of United States Court of Appeals

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065; 85-6105
D.C. No. CV85-440-HLH
Filed July 5, 1988

UNITED STATES OF AMERICA,

Petitioner/Appellee/
Cross-Appellant,

v.

FRANK S. ZOLIN,

Respondent-Appellee,

and

CHURCH OF SCIENTOLOGY OF CALIFORNIA, and
MARY SUE HUBBARD,

Intervenors/Appellants/
Cross-Appellees.

Before: BROWNING, TANG, PREGERSON, ALARCON, NORRIS, REINHARDT, BEEZER, BRUNETTI, THOMPSON AND LEAVY, Circuit Judges.

ORDER

The opinion published at 842 F.2d 1135 is amended to include the following concurrence:

CONCURRENCE

NORRIS, Circuit Judge, concurring in the result:

I write separately to make it clear that I believe the independent evidence rule has been and should continue to be the law of the circuit. *See United States* v. *Shewfelt*, 455 F.2d 836 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972). However, I cannot join the court's order because the majority has failed to make clear whether the order is a disposition on the merits, *i.e.*, whether it constitutes en banc authority that the *Shewfelt* independent evidence rule is the law of the circuit. If the order is intended to be a disposition on the merits, it is internally inconsistent because an en banc panel cannot both decide a case on the merits and vacate as improvidently granted the order of the full court authorizing it to decide the case.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-6065
85-6105
D.C. No. CV85-440-HLH

UNITED STATES OF AMERICA,
PETITIONER/APPELLEE/CROSS-APPELLANT

v.

FRANK S. ZOLIN, RESPONDENT/APPELLEE

AND

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD, INTERVENORS/APPELLANTS/CROSS-APPELLEES

ORDER AND DISSENT

Order Filed March 28, 1988

Before: BROWNING, Chief Judge, ANDERSON, TANG, PREGERSON, ALARCON, NORRIS, REINHARDT, BEEZER, BRUNETTI, THOMPSON AND LEAVY, Circuit Judges.

Dissent by Judge BEEZER

ORDER

En banc review was ordered in this matter under the mistaken assumption that *United States v. Shewfelt*, 455 F.2d 836 (9th Cir. 1972) and *United States v. Friedman*, 445 F.2d 1076 (9th Cir. 1971) were in conflict on the question whether "the government must first establish a prima facie case of fraud independently of the said

[attorney-client] communications," *Shewfelt*, 455 F.2d at 840, before "the privileged status of these communications can be lifted." *Id.* There is no conflict. In *United States v. Friedman*, we did not discuss the showing that the government must make *before* the trial court can examine attorney-client communications to determine whether "the thrust of these . . . conversations was to effectuate a plan of fraud." *Shewfelt*, 455 F.2d at 840. In *Shewfelt* we did, and concluded that the government must make a prima facie showing, independent of the communications involved, that the attorney-client communications were in furtherance of an intended or present illegality. *Id.* *Shewfelt* is the law of the circuit.

The dictum in *United States v. King*, 536 F. Supp. 253 (C.D. Cal. 1982) suggesting that *Shewfelt* "does not now appear to be the law in the Ninth Circuit," *id.* at 262, is disapproved. That portion of the three-judge panel opinion in *United States v. Zolin*, 809 F.2d 1411 (9th Cir. 1987), beginning with the first full paragraph on page 1418 to and including the last full paragraph in the second column on the same page, is ordered withdrawn. The opinion of the three-judge panel will stand in all other respects.

The order dated November 6, 1987, that this matter be reheard en banc, is vacated as improvidently granted.

BEEZER, Circuit Judge, with whom ANDERSON and THOMPSON, Circuit Judges, join, dissenting:

The order that this matter be reheard en banc was not improvidently granted. I dissent.

According to Ninth Circuit Rule 35-1, our order to rehear the matter en banc was entirely appropriate.[1] The independent evidence requirement is a procedure for in-

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[1] Ninth Circuit Rule 35-1 states, "When the opinion of a panel directly conflicts with an existing opinion by another court of appeals

voking the crime-fraud exception to the attorney-client privilege. We adopted this procedure, in a conclusory way, in *United States v. Shewfelt*, 455 F.2d 1076, 1080 (9th Cir. 1972). This procedure has not been endorsed by any other circuit court of appeals. The order filed today thus perpetuates a maverick version of the attorney-client privilege—a rule of national application. In addition, the attorney-client privilege, as a rule of evidence for the federal courts, has an overriding need for national uniformity. Considering that this circuit's position clashes with that of a majority of other circuits, our order that we rehear this matter en banc was most providently granted.

I

The crime-fraud exception defeats the attorney-client privilege. To invoke the exception, the government must make a prima facie showing that an otherwise privileged communication is in furtherance of fraud or crime. In this circuit the government has had to make the prima facie showing by the use of independent evidence—evidence other than the suspect communication itself. Elsewhere the government has been able to make the prima facie showing by the court's in camera inspection of the suspect communication. The substantive issue in this en banc case is: should we overrule *Shewfelt*, eliminate the independent evidence requirement, and allow in camera inspection of suspect communications? We should.

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and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing en banc."

II

Every circuit to face the situation this case presents has allowed in camera inspection. In reverse chronological order, they are the Sixth, Second, D.C., Eighth, Third, and Fourth Circuits.[2] Following is a sample of the cases.

Sixth: *In Re Antitrust Grand Jury*, 805 F.2d 155, 168-169 (6th Cir. 1986).

Second: *In Re Grand Jury Subpoena Duces Tecum*, 798 F.2d 32 (2d Cir. 1986); *In Re John Doe Corp.*, 675 F.2d 482, 486 and 490 (2d Cir. 1982).

D.C.: *In Re Sealed Case*, 754 F.2d 395, 399-401 (D.C. Cir. 1985) (IRS case closely resembling case now before us); *In Re Sealed Case*, 676 F.2d 793, 815 (D.C. Cir. 1982).

Eighth: *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 280 (8th Cir. 1984); *In Re Berkley & Co.*, 629 F.2d 548, 553 (8th Cir. 1980); *In Re Murphy*, 560 F.2d 326, 331 and 338 n.23 (8th Cir. 1977); *Pfizer Inc. v. Lord*, 456 F.2d 545, 551 (8th Cir. 1972) (per curiam).

Third: *In Re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 800 (3d. Cir. 1979).

Fourth: *Union Camp Corp. v. Lewis*, 385 F.2d 143, 144 (4th Cir. 1967).

III

Other circuits have not always addressed the underlying policy question in allowing in camera review for purposes of the crime-fraud exception. As an en banc panel

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[2] The Church of Scientology fails to distinguish these cases in any principled way. The Church does point out, correctly, that one of the D.C. cases only represents the views of one member of that court. *See In Re Sealed Case*, 676 F.2d 793, 815 (D.C. Cir. 1982)(J. Skelly Wright).

establishing the law of this circuit, however, we are obligated to address the policy question.

In particular, we are charged with evaluating the tradeoff between maintaining confidentiality and prosecuting crimes. In addressing this policy question, the Second Circuit considered an additional factor, grand jury secrecy. Grand jury secrecy would rest on the scale alongside maintaining confidentiality, weighing *against* in camera inspection; still the Second Circuit found that the balance tipped in favor of in camera inspection. *In Re John Doe Corp.*, 675 F.2d at 490.

The need to prosecute crimes strongly supports in camera inspection. The attorney-client privilege was not designed to protect communications in furtherance of fraud or crime. When a communication, otherwise within the privilege, itself furthers fraud or crime, independent evidence of that fact rarely will be available. In such cases the independent evidence requirement would simply insulate dishonest parties from prosecution. *See United States v. King*, 536 F.Supp 253, 262 (C.D. Cal. 1982) (declining to follow *Shewfelt's* independent evidence requirement).

Church of Scientology suggests that in camera inspection would undermine several important policies. First, inspection would allow the crime-fraud exception to eviscerate the attorney-client privilege. According to the Church, the possibility of inspection could "chill open attorney-client discussions." The fact that the inspections take place in camera, however, mitigates any chilling effect. A judge is not a prosecutor and will not expose discussions that are unrelated to the fraud or crime alleged.

Second, according to the Church, inspection would force courts to review "any and all attorney-client communications upon the mere allegation by a party . . . that the crime-fraud exception applies." The fear of disclosure of even innocent communications would give prosecutors an unfair litigation advantage, and courts would incur the intolerable burden of reviewing file after file of communications.

In fact, the fear of disclosure of innocent communications would be reduced if the Ninth Circuit eliminated the independent evidence rule. In camera inspection would allow a district court more precisely to determine which communications further crime or fraud and which do not. *Compare In Re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986).

In any case, the predicate for the Church's conclusions is incorrect: in camera inspection need not force courts to review any and all documents alleged to fall within the crime-fraud exception. I would set out a rule that gives district courts discretion. Besides helping to prevent prosecutorial fishing expeditions, a rule affording discretion to district courts would allow those courts to regulate their burden of in camera review.

A district court, faced with an argument that the crime-fraud exception applies, would decide for itself whether a given case warrants in camera review. A district court would exercise its discretion to conduct in camera review according to the circumstances—including the presence or absence of circumstantial and other independent evidence. In a proper case, a district court might *reject* the crime-fraud exception without in camera review: without inspecting all documents alleged to evidence crime or fraud, or even without inspecting any documents—without hearing all conversations alleged to evidence crime or fraud, or even without hearing any conversations.

For additional protection of privileged documents—to avoid disclosure of innocent documents—I would also set out a rule that requires district courts to *allow* the crime-fraud exception only in relation to communications that the court individually has inspected in camera. This approach would be in line with the Sixth Circuit's position. In *In Re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986), the Sixth Circuit required the district court to review documents in camera before ordering them produced:

> Not only do we believe *in camera* review is mandated to determine the scope of the order, *in camera* review of the documents could have assisted the court in determining whether a *prima facie* violation had been made.

Church of Scientology hints that inspection would undermine another policy, that of supporting adversarial argument. In endorsing in camera review, the Second Circuit decided that limitations on adversarial argument are outweighed by the need to resolve an evidentiary question while preserving confidentiality. 675 F.2d at 490. In any case, the independent evidence rule itself does not support adversarial argument insofar as the subject of the argument—the communication alleged to be in furtherance of crime or fraud—is available to one party and not the other. At best a distorted form of adversarial argument can occur.

Finally, according to the Church, Federal Rule of Evidence 104(a) and *Bourjaily v. United States*, 107 S.Ct. 2775 (1987), indicate that a court making preliminary inquiries about a privilege must abide by preexisting evidence rules such as the indpendent evidence requirement. Rule 104(a), however, is not on point. The rule deals with questions about the existence of a privilege, not about an exception to a privilege:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Church of Scientology gains no support for the independent evidence requirement by analogy to Rule 104(a). In the Ninth Circuit the rules of evidence with respect to privileges do allow for in camera review: a court undertakes in camera review of documents to decide whether the attorney-client privilege even exists with respect to those documents. *In Re Grand Jury Witness*, 695 F.2d 359, 362 (9th Cir. 1982).

Church of Scientology garners no support from *Bourjaily*. In that case the Supreme Court held that a showing to admit a co-conspirator's statement under Rule 801(d)(2) need not rely on independent evidence, but may rely on the statement itself. If anything *Bourjaily* suggests that a court may indeed examine suspect communications when considering the crime-fraud exception. *Compare* 107 S.Ct. at 2780.

Accordingly, I would overrule *Shewfelt*, eliminate the independent evidence requirement, and allow in camera inspection of suspect communications. The way I would formulate the rule, however, would dictate that we affirm the district court in this case.

IV

The government argues that the district court abused its discretion by rejecting the crime-fraud exception without inspecting all the tape recorded communications known to the government. According to the rule I have described, a

district court would be within its discretion to *reject* the exception without inspecting all suspect communications or even any communications. In this case the government submitted only a partial transcript of material to the district court. When the government submitted that partial transcript, the government was aware of the entire contents of the tapes. *See* Government's Brief at 12 (discussing Xanthos Declaration submitted to district court on motion for reconsideration). The district court was entitled to rely on the government to highlight, to the best of its ability, those parts of the tapes that might fall within the crime-fraud exception.

On appeal the government asks us to order the district court to inspect those parts of the tapes that were not within the partial transcript. In the district court, however, the government did not indicate that a partial transcript was an inadequate basis for a ruling on the crime-fraud exception. *See* Denial of Motion for Reconsideration, Government's Supplemental Excerpt of Record at Tab 80. The government never explained why it had failed to include the other parts of the tapes in the partial transcript in the first place. *Id.* The district court was well within its discretion to consider only the partial transcript, and the district court did not abuse its discretion in rejecting the crime-fraud exception.

V

We should overrule *Shewfelt* and eliminate the independent evidence requirement. An appropriate rule would make in camera review discretionary for the district court to reject the crime-fraud exception, mandatory for the district court to allow the exception and order disclosure. In this case the district court did not abuse its discretion by rejecting the exception without a complete review.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065, 85-6105

UNITED STATES OF AMERICA,
PETITIONER/APPELLEE/CROSS-APPELLANT

v.

FRANK S. ZOLIN, RESPONDENT/APPELLEE

AND

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD, INTERVENORS/APPELLANTS/CROSS-APPELLEES

Nov. 6, 1987

Prior Report: 809 F.2d 1411.

Before: BROWNING, Chief Judge, GOODWIN, WALLACE, KENNEDY, ANDERSON, HUG, TANG, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON O'SCANNLAIN, AND LEAVY, Circuit Judges.

ORDER

Upon the vote of a majority of the nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The previous three-judge panel assignment is withdrawn.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 85-6065; 85-6105
D.C. No. CV85-440-HLH

UNITED STATES OF AMERICA,
PETITIONER APPELLEE/CROSS-APPELLANT

v.

FRANK S. ZOLIN, RESPONDENT/APPELLEE

AND

CHURCH OF SCIENTOLOGY OF CALIFORNIA AND MARY SUE HUBBARD, INTERVENORS/APPELLANTS/CROSS-APPELLEES

OPINION

Argued and Submitted
November 6, 1986—Pasadena, California

Filed February 9, 1987

Before: JAMES R. BROWNING, Chief Judge, ALFRED T. GOODWIN AND JEROME FARRIS, Circuit Judges.

Opinion by Judge FARRIS

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

OPINION

FARRIS, Circuit Judge:

In July 1984, the Criminal Investigation Division of the IRS (Los Angeles District) began investigating L. Ron Hubbard's tax returns for the tax years 1979 through 1983. In October, the IRS served an administrative summons on the Clerk of the Los Angeles County Superior Court and requested that he produce certain documents relating to Hubbard's potential tax liability. (The Superior Court had obtained the documents in connection with an unrelated proceeding brought by the Church against a former member of the Church.) The Clerk willingly produced a number of documents, but refused to produce thirteen documents which had been ordered sealed by the Superior Court.

In January 1985, the Government initiated this action in an effort to compel the Clerk to produce the thirteen sealed documents. Shortly thereafter, the district court granted the motions to intervene which were brought by the Church and Mary Sue Hubbard. The Intervenors contended that each of the thirteen documents was either privileged, irrelevant, or both. They also argued that the summons was unenforceable because it was not issued pursuant to a "good faith" tax investigation.

Hearings were held in March and April. On April 30, 1985, the district court ruled that eight of the documents—exhibits 4-D, 4-E, 4-F, 4-G, 5-C, 5-G, 5-I, and 6-B—were irrelevant, privileged, or both, and did not need to be produced. It ruled that five documents—exhibits 5-K, 5-L, 5-O, 5-P, and 6-O—should be produced, but prohibited the IRS from disclosing them to another governmental agency except in connection with a criminal tax prosecution or with the court's approval. The court

further ruled that the Intervenors had failed to prove that the summons was not issued in "good faith."

The Intervenors filed timely notice of appeal on July 1, 1985. The Government filed timely notice of cross-appeal on July 15, 1985. The order appealed from is a final order which disposes of all claims of all parties. We have jurisdiction under 28 U.S.C. § 1291.

II. DISCUSSION

A. *Mootness*

On January 24, 1986, during the pendency of this appeal, L. Ron Hubbard died. The Intervenors argue that because Hubbard's death has foreclosed the possibility of any further investigation of Hubbard's potential criminal tax liability, this proceeding has become moot. We reject the argument for the reason stated in *United States v. Author Services*, 804 F.2d 1520, 1522 n.1 (9th Cir. 1986).

B. *Relevance of Exhibits 5-O, 5-P, and 6-O*

The IRS' power to examine records in connection with tax investigations is broadly construed. *See Liberty Financial Services v. United States*, 778 F.2d 1390, 1392 (9th Cir. 1985); *De Masters v. Arend*, 313 F.2d 79, 87 (9th Cir. 1963). The relevance of such evidence depends on whether it might throw light on the correctness of a taxpayer's returns. *United States v. Goldman*, 637 F.2d 664, 667 (9th Cir. 1980). The Government must demonstrate a "realistic expectation" of relevance, rather than an "idle hope" of relevance. *Id.* (quoting *United States v. Harrington*, 388 F.2d 520, 524 (2d Cir. 1969).

The Government bases its claims that the three exhibits are relevant on the declaration of Agent Petersell, in which Petersell stated:

> I have read the Petition to Enforce Internal Revenue Service Summons. Each of the items listed . . . is relevant to the investigation of L. Ron Hubbard in one or more of the following respects:
>
> A. Determining the extent to which income from the Church of Scientology inured to the benefit of L. Ron Hubbard.
>
> B. Determining whether L. Ron Hubbard conspired with others to impair and impede the Internal Revenue Service in the admiistration of the tax laws.
>
> C. Determining whether any violations of the Internal Revenue laws were done willfully with intent to evade tax.

The Government's other evidence of relevancy consists of three terse descriptions of the documents' contents in the petition for enforcement of the summons:

00000(5-0)	LRH note regarding the Mayor of Clearwater, Florida, 22 March 1978.
PPPPP (5-P)	LRH Statement regarding money from Scientology, 16 Feb. 1978.
000000(6-0)	LRH handwritten note regarding the Fair Game policy.

The record does not indicate the Government's sources for this information.

While the Government might have made a better showing, the district court did not clearly err in concluding that Petersell's declaration, when coupled with the general descriptions of the documents in the petition to enforce the summons, was sufficient to establish the relevance of the documents. We do not ignore our statement in *Goldman:*

> The Government's burden, while not great, is also not non-existent. The Government appears to argue that

the mere assertion of relevance by [an IRS agent] satisfied that burden. Even to the extent this might be true for records concerning the tax years being examined, relevance is not so clear when records for other years are sought.

Goldman, 637 F.2d at 667. Notwithstanding the fact that exhibits 5-O, 5-P, and 6-O all relate to years other than the tax years under investigation, we are satisfied that the district court, after balancing the indicia of relevancy against the impossibility of fully knowing the documents' contents before an actual review, did not clearly err in determining that the documents "might throw light" on the correctness of L. Ron Hubbard's return information.

C. *Waiver of Privilege As to Exhibits 5-K and 5-L*

The Intervenors do not contest on appeal the relevance of exhibits 5-K and 5-L. Instead, they contend that the district court erred in ruling that privileges which might otherwise have applied to the two documents were waived by a voluntary delivery of the documents to Gerald Armstrong. In addition, they argue that the district court erred when it concluded that exhibit 5-L would not be protected by the attorney-client privilege even in the absence of waiver because the affidavit of Hubbard's former attorney was too vague and conclusory to validly assert the privilege.

The attorney-client privilege is to be strictly construed *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). *See* 8 J. Wigmore, *Evidence* § 2291 at 554 (McNaughton rev. 1961). The logic behind the strict construction of the attorney-client privilege applies with equal force to the marital communications privilege: like the attorney-client privilege, the marital communications privilege is "an obstacle to the

investigation of the truth. . . . [that] ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." *Id.* The burden of demonstrating the existence of an evidentiary privilege rests on the party asserting the privilege. *See United States v. Gann*, 732 F.2d 714, 723 (9th Cir. 1984) (attorney-client privilege); *Weil*, 647 F.2d at 25 (evidentiary privileges generally). In order to establish the applicability of the attorney-client privilege to a given communciation, the party asserting the privilege must affirmatively demonstrate non-waiver. *See id.; United States v. Landof*, 591 F.2d 36, 38 (9th Cir. 1978).

The voluntary delivery of a privileged communication by a holder of the privilege to someone not a party to the privilege waives the privilege. *See Clady v. County of Los Angeles*, 770 F.2d 1421, 1433 (9th Cir. 1985) (the voluntary disclosure of a privileged attorney-client communication constitutes waiver); *United States v. McCown*, 711 F.2d 1441, 1452-53 (9th Cir. 1983) (the marital communications privilege is inapplicable to communications not intended to remain confidential); *Weil*, 647 F.2d at 24 (the voluntary disclosure of a privileged attorney-client communication constitutes waiver). Moreover, when the disclosure of a privileged communication reaches a certain point, the privilege may become extinguished even in the absence of a wholly voluntary delivery. *See In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) ("Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the privilege."). Whether the circumstances of the delivery of exhibits 5-K and 5-L to Armstrong gave rise to a waiver of the otherwise applicable privileges is a mixed question of law and fact that we review *de novo*. *See United States v. McConney*, 728 F.2d 1195, 1199-1204 (9th Cir. 1984) (en banc).

The district court held that all privileges potentially applicable to exhibits 5-K and 5-L were waived by a voluntary delivery of the documents to Gerald Armstrong. We agree. The Intervenors argue that the delivery could not have been voluntary since the correspondence between Armstrong and Hubbard contains no express indication that Armstrong intended to, or had Hubbard's permission to, collect communications between Hubbard and his wife or between Hubbard and his attorneys.

Although Hubbard did not explicitly grant Armstrong access to attorney-client or marital communications, Hubbard did, in a memorandum to Armstrong, grant Armstrong general permission to collect documents relevant to the proposed biography of Hubbard. The Intervenors' only argument in support of non-waiver is that Hubbard did not specifically grant Armstrong access to attorney-client and marital communications. More is required.

Since the attorney-client privilege which might otherwise have attached to exhibit 5-L was waived, we need not consider whether the attorney-client privilege was validly asserted by Hubbard's former attorney.

D. *Limited Evidentiary Hearing*

We review for abuse of discretion. *See United States v. Stuckey*, 646 F.2d 1369, 1373 (9th Cir. 1981). *See generally Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984) (a district court's decisions relating to discovery matters are reviewed for abuse of discretion).

The purpose of the limited evidentiary hearing was to determine whether the summons enforcement proceeding was legitimate and in "good faith," rather than merely camouflage for an ulterior non-tax motive. The "good faith" standard seeks to prevent the IRS from becoming an information-gathering agency for other governmental

agencies. *See United States v. LaSalle National Bank*, 437 U.S. 298, 317 (1978); *Stuckey*, 646 F.2d at 1373. The task is to identify " 'those rare cases where bald allegations of harassment or improper purpose can be substantiated.' " *Author Services*, 804 F.2d at 1523 (quoting *United States v. Church of Scientology of California*, 520 F.2d 818, 824 (9th Cir. 1975)). The focal issue is whether an IRS investigation is motivated by legitimate tax purposes. *See United States v. Powell*, 379 U.S. 48, 57-58 (1964). The district court may properly limit evidentiary hearings on the "good faith" issue to prevent a frustration of legitimate Government objectives. *Church of Scientology*, 520 F.2d at 823-25.

The Intervenors argue that the district court improperly limited its inquiry to the issue of whether the summons itself was issued in "good faith," and ignored and larger issue of whether the overall investigation was in "good faith." We reject the argument. At the hearing, C. Phillip Xanthos, the Branch Chief of the IRS Criminal Investigation Division (Los Angeles District), specifically testified as to the legitimate tax-determination objectives of the investigation. This and other testimony was sufficient to support the district court's finding that the summons was issued in "good faith." *See LaSalle National Bank*, 437 U.S. at 317. *See also Stuckey*, 646 F.2d at 1376; *United States v. Zack*, 521 F.2d 1366, 1368-69 (9th Cir. 1975).

E. *Restrictions on IRS Disclosure of the Summoned Documents*

The district court ordered that "the documents produced in response to the summons shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained." We review the district court's order for abuse

of discretion. *See United States v. Columbia Broadcasting System,* 666 F.2d 364, 368 (9th Cir. 1982).

The Government argues that the district court's order conflicts with the disclosure provisions of 26 U.S.C. § 6103. Those provisions, the Government suggests, are the exclusive limitations upon IRS disclosure of return information. In addition, the Government argues that the order represents an improper attempt to enjoin the IRS from obeying a duly enacted federal law.

We recently rejected this argument in *Author Services,* and held that a district court's order restricting the IRS' ability to disclose summoned materials to other governmental agencies, "[r]ather than being an abuse of discretion, . . . [could] be a wise exercise of control." *Author Services,* 804 F.2d at 1526. The district court's order in this case created a mechanism whereby the district court could monitor the IRS' use of the summoned documents. This is an appropriate exercise of the district court's discretion: "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." *Powell,* 379 U.S. at 58. *See S.E.C. v. ESM Government Securities, Inc.,* 645 F.2d 310, 316-17 (5th Cir. 1981). A district court may, when appropriate, condition enforcement of a summons on the IRS' agreeing to abide by disclosure restrictions. *Author Services,* 804 F.2d at 1525 (citing *United States v. Texas Heart Institute,* 755 F.2d 469, 481 (5th Cir. 1985)).

The Intervenors also argue that the district court's order violates 26 U.S.C. § 7421(a) (the "Anti-Injunction Act"), because it has the effect of enjoining the IRS from disclosing the summoned tax information. We reject the argument for the reasons stated in *Author Services,* 804 F.2d at 1526.

F. *Exhibit 5-C ("the Tapes")*

The district court's rulings on the scope of the attorney-client privilege involve mixed questions of law and fact, and are reviewable *de novo. See McConney,* 728 F.2d at 1202. Where the relevant scope of the attorney-client privilege is clear and the decision that the district court must make is essentially factual, however, the district court's rulings as to the privilege are reviewed for clear error. *Id.* at 1200.

The Government contends that the district court erred in finding that the "common interest" rule covered the tapes. The "common interest" rule protects communications made when a nonparty sharing the client's interests is present at a confidential communication between attorney and client. The paradigm case is where two or more persons subject to possible indictment arising from the same transaction make confidential statements that are exchanged among their attorneys. *See Hunydee v. United States,* 355 F.2d 183, 185 (9th Cir. 1965).

The Government is incorrect, however, in arguing that the "common interest" rule is limited to such a case. Even where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no immediate liability, it can still be found to have a common interest with the party seeking to protect the communications. *See Burlington Industries v. Exxon Corp.,* 65 F.R.D. 26, 44-45 (D. Md. 1974); *Stanley Works v. Haeger Potteries, Inc.,* 35 F.R.D. 551, 554-55 (N.D. Ill. 1964).

The district court found that the parties present at the meetings recorded on the tapes "had a common interest" in sorting out the respective affairs of the Church and Mr. Hubbard. We agree. All of the non-lawyers present at the meeting were employees of the Church.

The Government also challenges the district court's finding that the Church did not waive its attorney-client privilege when it inadvertently delivered the tapes to Armstrong. (Hubbard's personal secretary gave Armstrong the tapes under the mistaken impression that they were blank.) In *Transamerica Computer Co., Inc. v. International Business Machines, Corp.*, 573 F.2d 646 (9th Cir. 1978), we held that whereas a waiver of the attorney-client privilege occurs when a holder of the privilege voluntarily discloses the privileged matter, no waiver occurs if the holder has no opportunity to claim the privilege or if the holder was erroneously compelled to disclose the privileged matter. *Id.* at 651. The secretary's delivery of the tapes to Armstrong was sufficiently involuntary and inadvertent as to be inconsistent with a theory of waiver.

The Government challenges the district court's ruling that the "crime-fraud" exception to the attorney-client privilege did not apply to the tapes. The attorney-client privilege does not protect communications that further a crime or fraud. *See United States v. Hodge and Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977). The Government had the burden of making a prima facie showing that the attorney-client communications recorded on the tapes were in furtherance of an intended or present illegality. *Id.* We agree with the district court's conclusion that the Government failed to satisfy this burden.

The Intervenors argue that the Government's evidence of crime or fraud must come from sources independent of the attorney-client communications recorded on the tapes. In support of this argument, they cite *United States v. Shewfelt*, 455 F.2d 836 (9th Cir. 1972). In *Shewfelt*, we said that "before the privileged status of [attorney-client] communications can be lifted, the government must first establish a prima facie case of fraud *independently* of said communications." *Id.* at 840 (emphasis added). Notwithstanding *Shewfelt*, the Government argues that in assessing the applicability of the "crime-fraud" exception to the tapes the district court should have considered evidence of the contents of the tapes which the Government presented to the court.

Shewfelt's independent evidence requirement has been strongly criticized. In *In re Berkley and Co., Inc.*, 629 F.2d 548, 553 n.9 (8th Cir. 1980), the Eighth Circuit observed that the two cases cited in *Shewfelt*, assertedly in support of the independent evidence requirement, in fact simply state that a party seeking disclosure under the "crime-fraud" exception must make a prima facie showing of crime or fraud in order to shift the burden of showing the inapplicability of the exception to the party resisting disclosure.

In the fourteen years that have passed since *Shewfelt* was decided, only one court has cited it as authority for the independent evidence requirement. *See Kockums Industries Limited v. Salem Equipment, Inc.*, 561 F. Supp. 168, 171 (D. Ore. 1983). By contrast, a number of courts have rejected the *Shewfelt* position. *See, e.g., In re Sealed Case*, 676 F.2d at 815; *In re Special September 1978 Grand Jury*, 640 F.2d 49, 59 (7th Cir. 1980); *In re Berkley*, 629 F.2d at 553 n.9; *Coleman v. American Broadcasting Companies, Inc.*, 106 F.R.D. 201, 207 n.9 (D.D.C. 1985); *United States v. King*, 536 F. Supp. 253, 262 (C.D. Cal. 1982).

In *Hodge and Zweig*, we discussed the "crime-fraud" exception at length without ever referring to *Shewfelt*. 548 F.2d at 1354-55. Instead, we cited repeatedly to *United States v. Friedman*, 445 F.2d 1076 (9th Cir. 1971), a decision which implicitly recognized that a district court may examine the disputed communications themselves in order to determine the applicability of the "crime-fraud" exception. *Id.* at 1354.

In this case, the communications recorded on the tapes appear to be the Government's best evidence establishing the applicability of the "crime-fraud" exception. This is not surprising, since the illegal advice allegedly given by Church attorneys to Church officials is an integral part of the intended illegality that the Government seeks to establish. In this connection, the court's observation in *King* is pertinent: "[S]ince the illegal advice is usually given in the attorney-client setting, applying *Shewfelt* to such cases would, in most instances, simply serve to insulate dishonest attorneys from prosecution for obstruction of justice." *King*, 536 F. Supp. at 262.

In *King*, the court speculated that "the independence test set forth in *Shewfelt* does not appear to be the law in the Ninth Circuit." *Id.* We cannot agree. Whatever the merits of the criticisms that have been leveled against *Shewfelt*'s independent evidence requirement, we are bound to adhere to our holding in *Shewfelt* unless and until it is reversed by an *en banc* panel of this court. *See United States v. Spilotro*, 800 F.2d 959, 967 (9th Cir. 1986); *Atonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120, 1132 n.6 (9th Cir. 1985).

The Government's independent evidence of intended illegality consists primarily of: 1) Agent Petersell's Supplemental Declaration of March 8, 1985, in which Petersell stated that his discussions with Gerald Armstrong had given him reason to believe that the communications recorded on the tapes focused generally on the intentional violation of the tax laws; and 2) Petersell's Supplemental Declaration of March 15, 1985, in which Petersell stated that his discussions with three other former Church employees had given him reason to believe that the communications recorded on the tapes specifically focused on i) a proposed scheme whereby the Church's cash transfers to Hubbard would be disguised as payments for services

rendered (allegedly to insulate Hubbard from tax liability and to protect the Church's tax-exempt status), and ii) a proposed scheme whereby Hubbard would be able to control royalty income derived from the "Trademark Trust" (a trust that was created to manage Hubbard's various Scientology-related and other trademarks) without that control being traceable to him.

We agree with the district court that this evidence, while not altogether insubstantial, is not sufficient to make out the requisite prima facie showing of intended illegality.

AFFIRMED.

APPENDIX K

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 85-0440-HLH

UNITED STATES OF AMERICA

v.

FRANK ZOLIN

CIVIL MINUTES – GENERAL

Date June 10, 1985

PRESENT: Hon: HARRY L. HUPP, Judge

ATTORNEYS PRESENT FOR PLAINTIFFS:
Robert S. Horwitz, AUSA C. Magnusen

ATTORNEYS PRESENT FOR DEFENDANTS:
Gordon, Trask, Donald Randolph,
Michael Lee Hertzberg (for intervenors)

PROCEEDINGS: Plaintiff's Motion for Reconsideration

The motion for reconsideration of the court's order of April 30, 1985, is denied.

Plaintff complains that the court should have listened to the tapes in toto. While this was at one time discussed with counsel, thereafter Mr. Petersell's declaration was sub-

mitted, and no one suggested that this was an inadequate basis on which to determine the attorney-client privilege question. Mr. Xanthos' declaration stands on a similiar footing; no reason is suggested as to why it could not have been submitted as a part of the materials considered in the April hearings.

Plaintiff also complains that the court should not have restricted the IRS from disclosing for other governmental purposes the contents of the documents ordered produced. Since the entire basis of the summons proceeding was to obtain material for a tax investigation, the court thinks it reasonable to restrict the use of the material for that purpose, unless a criminal prosecution is instituted. If exigencies of other litigation make it necessary, the IRS is free to make its case for an exception to this court.

APPENDIX L

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 85-0440-HLH

UNITED STATES OF AMERICA, PETITIONER

vs.

FRANK S. ZOLIN, CLERK OF THE SUPERIOR COURT, RESPONDENT

CHURCH OF SCIENTOLOGY OF CALIFORNIA, INTERVENOR

[Filed Apr. 10, 1985]

ORDER

The Court makes the following Orders and Findings:

1. Reconsideration is denied as to Exhibits 5G and 5I; the Order of March 12, 1985 will stand.

2. Intervenor Church has failed to raise any doubt of the good faith of the Internal Revenue Service in pursuing this summons enforcement proceeding. Specifically, it is found that a bona fide criminal tax investigation of L. Ron Hubbard is being conducted by the IRS for the years 1979-83, that the matter has not been referred to the Department of Justice for prosecution, that the summons was validly issued pursuant to that investigation, that the agent issuing the summons was in good faith in doing so, and did not do so for an improper purpose, or to harass the taxpayer, or for a collateral purpose. No further discovery on this issue is warranted.

3. With the exception of Exhibits 6B and 5C (the "MCCS tapes"), the Court finds that all potentially applicable privileges (attorney-client, marital) have been waived by voluntary delivery of the material to Gerald Armstrong. In addition, no privilege has been validly asserted by the holder of a potential privilege as to certain items (Exhibits 5L and 5P).

4. Sufficient relevancy being shown, the IRS is entitled to inspect and copy Exhibits 5K, 5L, 5O, 5P and 60, and the summons is to be enforced as to those items.

5. No relevancy or waiver has been shown for Exhibit 6B, and it need not be produced.

6. As to Exhibit 5C (the "MCCS tapes"), the Court finds:

(a) The tapes consist of confidential communications between attorneys and clients or clients' authorized agents.

(b) The confidential communications were between clients and their attorneys who had a common interest; the privilege was, therefore, not destroyed by publication of the communication to an outsider.

(c) There was no waiver of the privilege by delivery to an outsider, the Court finding that the tapes were delivered to Gerald Armstrong by mistake, and, in addition, that Petitioner has not carried the burden of showing waiver.

(d) The "fraud-crime" exception to the attorney-client privilege does not apply. The quoted excerpts tend to show or admit past fraud but there is no clear indication that future fraud or crime is being planned.

(e) The Order sealing the Petersell affidavit (filed March 15, 1985) quoting excerpts from the tapes will remain sealed.

(f) This Court's copy of the tapes will remain sealed in possession of the Court's Clerk until after any appellate

review of this Order, after which it is to be returned to the Superior Court. The Clerk of the Superior Court need not produce its copy of the tapes pursuant to the summons.

7. The documents delivered hereunder shall not be delivered to any other government agency by the IRS unless criminal tax prosecution is sought or an Order of Court is obtained.

Petitioner is to prepare an Order in accord with this Order and the Order of March 12, 1985. This Order is stayed for sixty (60) days, and thereafter if an appeal or application for a writ is filed and until decision on appeal or writ application is rendered.

IT IS SO ORDERED.

DATED: April 30, 1985.

/s/ HARRY L. HUPP
HARRY L. HUPP
United States District Judge

APPENDIX M

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 84-9003-HLH

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
a California corporation,
Plaintiff,

v.

GERALD ARMSTRONG, et al.,
Defendants.

MARY SUE HUBBARD,
Intervenor.

Date January 22, 1985

ORDER

IT IS ORDERED that all documents remaining in the possession of the Clerk be delivered forthwith to the Clerk of the Superior Court of Los Angeles County. This is a final Order terminating this proceeding. The various motions are determined accordingly. The effect of this Order is stayed for ten (10) days.

This whole dispute was caused by a mistake. The Court proposes to remedy it by putting the matter back in *status quo ante*, and let the parties resume their apparently never-ending litigation at the point where they would have been

except for the mistake. That is the plain and simple reason for the above Order.

What happened (meaning: "findings of fact") was that the Superior Court had impounded and sealed a group of documents of the Church pending litigation between the Church and Armstrong over possession of them. On deciding the portion of the case dealing with document possession, the trial judge "unsealed" the portion of the documents admitted into evidence or marked for identification, leaving "sealed" the balance pending finality of the judgment. A flurry of stay and "un-stay" orders followed in every conceivable court. During this period, the IRS served a summons on the Superior Court for delivery of the documents, which the Superior Court then declined to follow. Within a period between an "un-stay" and another stay, during the temporary absence of the Superior Court trial judge, the then Presiding Judge of the Superior Court signed an order allowing the IRS access to all of the documents under the mistaken impression that he was carrying out the order of the trial judge. The Presiding Judge promptly cancelled his order on being advised of the error, but in the meantime the IRS had obtained copies of documents and tapes in both the sealed and unsealed category. The Church caused a Superior Court subpoena to be served on the IRS for return of the copied items, and the IRS promptly removed the subpoena (but not the balance of the Superior Court action) here. This Court ordered the IRS to deposit the copied items with the Clerk until the welter of stay and "un-stay" orders resolved itself, which it did, "un-stay" being the final word.

Accordingly, the Court ordered the documents which were unsealed by the Superior Court order delivered to the IRS and now must figure out what to do with the sealed documents and tapes. The answer seems easy; they ought to go back to where they should have been in the first place, and that is the Court's Order. The IRS can start its summons enforcement proceedings and the question of whether an IRS summons beats a Superior Court sealing order can be tested.

If authority be needed for the above conclusions (this is the conclusion of law), the closest case in point (*Linn* v. *Chiva-*

tero (5th Cir. 1983) 714 F.2d 1278) holds that the District Court may make an order putting things back to the *status quo ante* when the IRS gets documents through a mistake.

This document is the final Order in this matter and is intended to dispose of it.

DATED: January 22, 1985.

/s/ HARRY L. HUPP
United States District Judge

Supreme Court, U.S.
FILED
FEB 7 1992
OFFICE OF THE CLERK

(2)

No. 91-946

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA AND FRANK S. ZOLIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an appeal from an order enforcing an administrative summons becomes moot when the materials sought by the summons have been produced pursuant to the order.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-946

CHURCH OF SCIENTOLOGY OF CALIFORNIA, PETITIONER

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UNITED STATES OF AMERICA AND FRANK S. ZOLIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. la-2a) dismissing the appeal as moot is unreported.[1] The orders entered by the district court (Pet. App. 3a-11a) on March 13, April 15, and May 21, 1991, are unreported.

[1] The prior opinion of the court of appeals (Pet. App. 13a-15a) following remand from this Court in *United States* v. *Zolin*, 491 U.S. 554 (1989), is reported at 905 F.2d 1344, cert. denied, 111 S. Ct. 1309 (1991).

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1991. The petition for a writ of certiorari was filed on December 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1984, the Internal Revenue Service (IRS) commenced an investigation of the tax returns of L. Ron Hubbard, founder of petitioner (the Church of Scientology), and others, for tax years 1979-1983. In July of 1984, Los Angeles newspapers reported that former Church of Scientology officials had testified in a state court action in California that millions of dollars had been transferred to Hubbard in the late 1970's and early 1980's from various Scientology entities. As part of its investigation, the IRS served an administrative summons on the Clerk of the Los Angeles County Superior Court seeking documents relating to petitioner's activities from the record of that case.[2] The Clerk's Office, however, refused to produce 13 documents that had been ordered sealed by the Superior Court. The IRS then brought this proceeding in federal district court to enforce its administrative summons. See *United States* v. *Zolin*, 491 U.S. 554, 557-558 (1989).

Petitioner and Mary Sue Hubbard intervened to oppose production of the sealed documents. Petitioner claimed that sealed Exhibit 5-C—which contains tape recordings of two meetings between various attorneys

[2] The Internal Revenue Service is authorized to issue summonses to obtain production of "any books, papers, records, or other data" that may be relevant in "determining the liability of any person for any internal revenue tax" (26 U.S.C. 7602(a)(1)). The district courts have jurisdiction to enforce compliance with these administrative summonses. 26 U.S.C. 7604.

and representatives of petitioner and L. Ron Hubbard (the MCCS tapes)—was protected by the attorney-client privilege. The government contended, however, that the MCCS tapes fell within the crime-fraud exception to the attorney-client privilege. See 491 U.S. at 558.[3] The district court ruled that the MCCS tapes contained confidential attorney-client communications, that the privilege had not been waived and that the crime-fraud exception to the attorney-client privilege did not apply. See *id.* at 559.

2. The court of appeals affirmed. *United States* v. *Zolin*, 809 F.2d 1411 (9th Cir. 1987). The court held that the crime-fraud exception may be invoked to compel disclosure of otherwise privileged communications only when the movant has first established a *prima facie* case of fraud with evidence that is independent of the communications themselves. *Id.* at 1418-1419; Pet. App. 40a-41a. The court concluded that there was insufficient "independent evidence" to establish that the crime-fraud exception was applicable to the MCCS tapes. *Ibid.*

This Court granted certiorari and, on June 21, 1989, held that allegedly privileged materials may be reviewed *in camera* to determine whether they fall within the crime-fraud exception to the attorney-client privilege. *United States* v. *Zolin*, 491 U.S. at 562-575. The Court concluded that such *in camera* review is

[3] The affidavits submitted by the government alleged that the taped meetings "focused generally on the intentional violation of the tax laws," and specifically discussed "i) a proposed scheme whereby the Church's cash transfers to Hubbard would be disguised as payments for services rendered (allegedly to insulate Hubbard from tax liability and to protect the Church's tax-exempt status), and ii) a proposed scheme whereby Hubbard would be able to control * * * royalty income * * * without that control being traceable to him." See *United States* v. *Zolin*, 809 F.2d 1411, 1418-1419 (9th Cir. 1987); Pet. App. 40a-41a.

proper when the requesting party has presented relevant, non-privileged evidence that establishes "a reasonable belief that *in camera* review may yield evidence that establishes" the applicability of the crime-fraud exception. *Id.* at 574-575.

3. On remand, the court of appeals examined the partial transcripts of the tapes, along with the independent evidence that it had reviewed in its first opinion, and concluded that there was "sufficient evidence of intended illegality to establish that the tapes are within the crime-fraud exception" (Pet. App. 14a-15a). In so ruling, the court of appeals stated (*id.* at 15a):

> The partial transcripts demonstrate that the purpose of the MCCS project was to cover up past criminal wrong-doing. The MCCS project involved the discussion and planning of future frauds against the IRS in violation of 18 U.S.C. § 371, * * * [and the] figures involved in MCCS admit on the tapes that they are attempting to confuse and defraud the U.S. Government. The purpose of the crime-fraud exception is to exclude such transactions from the protection of the attorney-client privilege.

On September 19, 1990, the court of appeals denied petitioner's request for rehearing. Petitioner then filed a petition for a writ of certiorari with this Court.

4. Petitioner did not seek a stay of the mandate pending disposition of its petition for a writ of certiorari. When the mandate issued, the district court ordered the MCCS tapes to be produced to the government. On petitioner's motion, however, the district court thereafter ordered the government to return the tapes to the clerk of the district court until this Court acted on the pending certiorari petition (Pet. App. 7a-11a).

On March 18, 1991, this Court denied the petition for a writ of certiorari. *Church of Scientology* v. *United States*, 111 S. Ct. 1309. The district court then entered its order requiring the MCCS tapes to be delivered to the IRS. In response to petitioner's renewed efforts to relitigate the merits of this case, the district court observed that petitioner "cannot win in this court a case which it lost in the Supreme Court and the Court of Appeals" (Pet. App. 6a). Noting that "[l]itigation must end sometime" (*ibid.*), the district court refused to stay its order pending appeal. The court did, however, grant a brief, temporary stay to allow petitioner an opportunity to seek a stay pending appeal from the court of appeals (*ibid.*).

5. On May 6, 1991, the court of appeals denied petitioner's motion for a stay. Petitioner's application to this Court for a stay was denied by Justice O'Connor on May 8, 1991. The MCCS tapes were then released to the United States Attorney, and copies of the tapes were delivered to the Internal Revenue Service.

On May 24, 1991, petitioner filed a renewed emergency motion for a stay pending appeal. On May 30, 1991, the court of appeals denied that motion and ordered petitioner to show cause why its appeal should not be dismissed as moot.[4] On September 10, 1991, the court of appeals dismissed the appeal, concluding that this case is moot because "the tapes have been turned over to the IRS in compliance with the summons enforcement order" and no actual, present controversy therefore exists (Pet. App. 2a, citing *United States* v. *Kersting*, 891 F.2d 1407, 1410 (9th Cir. 1989), cert. denied, 111 S. Ct. 49 (1990)).

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[4] On May 31, 1991, the Church filed a second emergency motion for a stay pending appeal. That motion was denied by the court of appeals on the same day.

ARGUMENT

1. An IRS summons may be issued to obtain information that "may be relevant" in determining the liability of any person for federal taxes. 26 U.S.C. 7602(a)(1). The agency has no power to enforce its summons directly; instead, it must apply to a federal district court for an order compelling compliance. See 26 U.S.C. 7604. An order enforcing the summons does not adjudicate that the information sought is admissible in further proceedings concerning the taxpayer's liabilities. Like other discovery orders issued by a district court, it merely determines that the information sought "may be relevant" for that purpose. See 26 U.S.C. 7602(a)(1).

In opposing enforcement of the summons issued in this case, petitioner sought to prevent disclosure to the IRS of information that may be relevant in determining the taxes of L. Ron Hubbard and others. Because this information has now been disclosed to the IRS, and because the potential admissibility of that information in further proceedings (if any) that may occur in determining such tax liabilities is not presently ripe for consideration, there is no present controversy between the parties that is proper for judicial disposition.

Under Article III, Section 2 of the Constitution of the United States, the judicial power of the United States extends only to "cases" and "controversies." It is the duty of a court "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills* v. *Green*, 159 U.S. 651, 653 (1895); see generally *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). The "actual controversy" that is required must exist "at all stages of review, not merely at the time the complaint is filed."

Preiser v. *Newkirk*, 422 U.S. at 401; *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974). A case that presented a live controversy when the complaint was filed may become moot prior to entry of the district court's decision or on appeal or after a petition for a writ of certiorari has been filed. *DeFunis* v. *Odegaard*, 416 U.S. 312, 316-320 (1974). If the relief a party seeks is no longer available, the case no longer "touch[es] the legal relations of parties having adverse legal interests," is not an Article III case or controversy, and must be dismissed as moot. See *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937); *Brownlow* v. *Schwartz*, 261 U.S. 216, 217-218 (1923) (where the defendant municipality had complied with the trial court's order to issue plaintiff a building permit prior to the hearing on appeal, the defendant's appeal was deemed moot since no relief could be obtained by either party).

In the present case, the court of appeals held that the MCCS tapes were within the scope of the crime-fraud exception and should be produced pursuant to the summons (Pet. App. 15a). Since those documents have now been produced to the IRS pursuant to the summons, there is no continuing, live controversy with respect to whether the information on the tapes may be disclosed to the IRS. Because that is the only issue to be addressed in proceedings concerning enforcement of the summons, any further opinion that a court might render in this case would be advisory in nature. The court of appeals therefore properly dismissed the appeal as moot. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950); *United States* v. *Kersting*, 891 F.2d 1407, 1410 n.8 (9th Cir. 1989), cert. denied, 111 S. Ct. 49 (1990); *Hintze* v. *IRS*, 879 F.2d 121, 124-125 (4th Cir. 1989); *United States* v. *Church of World Peace*, 878 F.2d 1281 (l0th Cir. 1989); *United*

States v. *Sherlock*, 756 F.2d 1145, 1146-1147 (5th Cir. 1985); *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1278-1279 (7th Cir. 1984); *United States* v. *Kis*, 658 F.2d 526, 533 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Equity Farmers Elevator*, 652 F.2d 752 (8th Cir. 1981); *United States* v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710, 711 (9th Cir. 1981); *United States* v. *Deak-Perera International Banking Corp.*, 610 F.2d 89 (2d Cir. 1979); *Kurshan* v. *Riley*, 484 F.2d 952 (4th Cir. 1973); *United States* v. *Lyons*, 442 F.2d 1144, 1145 (1st Cir. 1971).

2.a. Petitioner argues (Pet. 9-14, 21) that this case is not moot because the courts could grant effective relief by ordering the return of the MCCS tapes and any documents derived from them. The argument is incorrect and has been rejected routinely by all but one of the courts of appeals.

In a summons enforcement proceeding, the government seeks only to obtain access to information. Once the parties have complied with the summons, the information at issue has been fully disclosed to the government: a decision reversing an enforcement order could not alter the fact that the records have been produced and could not erase the knowledge obtained from those records. When, as here, the particular rights that are the subject of an appeal—access for the IRS to information contained on the MCCS tapes—are no longer subject to effective redress by the courts, no case or controversy exists to support the continuing exercise of federal jurisdiction. For this reason, as the Ninth Circuit noted in *United States* v. *Kersting*, 891 F.2d at 1410 n.8, "[e]very circuit that has considered this question, except the Third Circuit, see *Gluck* v. *United States*, 771 F.2d 750, 754 (3d Cir. 1985), has held that compliance with an IRS summons moots an appeal of the enforceability of the summons." *Ibid.*

Notwithstanding this clear authority, petitioner contends (Pet. 11-12, 21) that the court of appeals could have granted effective relief in this case by ordering the return of the tapes and material derived therefrom. As the court of appeals noted (Pet. App. 15a n.2), however, it is well established that questions of suppression of evidence obtained under an IRS summons are not ripe for consideration until such time as the government seeks to offer the discovered materials as evidence in some later proceeding. *United States* v. *Kis*, 658 F.2d at 533. There is here, as in the ordinary case, nothing but speculation to suggest that the government will hereafter offer these materials in evidence in some proceeding. If it does so, the affected parties will then be free to challenge the introduction of the materials at that time.[5] Because this potential controversy concerning future uses that may be made of the summoned information is merely hypothetical,[6] there is "no need, nor would it be proper, to decide that question now." *Ibid.* Accord *United States* v. *Kersting*, 891 F.2d at 1411; *Hintze* v. *IRS*, 879 F.2d at 125; *United States* v. *Sherlock*, 756 F.2d at 1147; *SEC* v. *Laird*, 598 F.2d 1162, 1163 (9th Cir. 1979) (appellants may adequately protect their interests in administrative subpoena cases by moving to suppress subpoenaed information in subsequent proceedings). See *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971); *United States* v. *Munsingwear, Inc.*, 340 U.S. at 39-40 ; *United States*

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[5] This Court denied certiorari in March 1991 from the court of appeals' ruling on the merits of the crime-fraud issue. It is therefore improbable that petitioner would prevail in any indirect or collateral attack on that ruling.

[6] At petitioner's request, the district court directed the IRS not to deliver the summoned information to other government agencies except under certain, limited circumstances (Pet. App. 4a). That aspect of the court's order is not at issue in this petition.

v. *First American Bank*, 649 F.2d 288, 289 n.3 (5th Cir. 1981); *United States* v. *Lyons*, 442 F.2d 1144, 1145 (1st Cir. 1971). Cf. *United States* v. *Blue*, 384 U.S. 251, 254 (1966). [7]

Petitioner errs in relying on *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d 1184 (9th Cir. 1981), aff'd *sub nom. United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), for the proposition that the government's possession of the summoned information is a "continuing" wrong (Pet. 20) that justifies continuing jurisdiction. In *Sells*, the Ninth Circuit held that an appeal involving allegations of impropriety in the disclosure of grand jury materials was not moot because prospective relief preventing further disclo-

[7] As noted above, *Gluck* v. *United States*, 711 F.2d 750, 754 (3d Cir. 1985), is the only contrary circuit authority. In *Gluck*, the Third Circuit reasoned that a case is not moot after compliance with a summons because the court can order suppression of illegally obtained evidence. *Ibid.* As the Seventh Circuit correctly ruled in *United States* v. *Kis*, 658 F.2d at 533, however, "[i]t would be highly speculative" to rule on the legality of an IRS summons *after* compliance "for there is no guarantee that the Government will ever seek to use" the summoned evidence (*ibid.*). A ruling on the merits in this context would simply be an advisory opinion. As petitioner concedes (Pet. 14), "on the precise narrow issue presented here," the Third Circuit is the only circuit to reach a different conclusion.

Contrary to petitioner's contentions (Pet. 12-13), the decision in *Casey* v. *FTC*, 578 F.2d 793, 796 (9th Cir. 1978), is not inconsistent with these decisions. In *Casey*, the Ninth Circuit held that compliance with an FTC subpoena had not mooted an appeal even though the appellant had produced all of the requested documents. In so ruling, the Ninth Circuit emphasized that, since the documents had not been verified, as required by the subpoena, full compliance had not occurred and the controversy was therefore still live. *Id.* at 798. See also *United States* v. *Barrett*, 837 F.2d 1341, 1348 (5th Cir. 1988) (en banc), cert. denied, 492 U.S. 926 (1989) (IRS summons enforcement not moot where case involved issues pertaining to alleged violations of Section 6103 of the Internal Revenue Code).

sures could be granted by the trial court if the secrecy of the grand jury were violated. 642 F.2d at 1187-1188. There is no suggestion in the present case, however, that improper, future disclosures will occur. To the contrary, the district court has expressly limited the circumstances under which the IRS may disclose these documents to other federal agencies (Pet. App. 4a), and the scope of this restriction is not at issue in this case. See note 6, *supra*. The speculative possibility that a future controversy may arise concerning implementation of a final order relating to future disclosures *by* the IRS cannot serve as a basis for continuing jurisdiction over a case that concerns the moot question whether disclosures are to be made *to* the IRS.

b. Finally, petitioner contends (Pet. 14-22) that the fact that the documents at issue were surrendered to the IRS by a third party, rather than by petitioner directly, prevents this case from being moot. That difference in the method of compliance with the summons does not create a distinction for the purpose of the constitutional case or controversy requirement. Contrary to petitioner's contentions (Pet. 14-18), the many decisions that hold that compliance with an IRS summons renders moot further litigation concerning enforcement of the summons are not limited to situations where a taxpayer, as distinguished from a disinterested third party, complies with the summons. See, *e.g.*, *United States* v. *Silva & Silva Accountancy Corp.*, 641 F.2d at 711 (taxpayer's appeal of order enforcing IRS summons mooted by accountant's compliance with summons); *Hintze* v. *IRS*, 879 F.2d at 124-125 (third-party bank's compliance with IRS summons enforcement order precluded exercise of appellate jurisdiction); *United States* v. *First American Bank*, 649 F.2d at 289 (same); *United States* v. *Deak-Perera International Banking Corp.*, 610 F.2d at 89 (same).

The two allegedly conflicting cases on which petitioner purports to rely (Pet. 16-17, citing *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720, 724 (1st Cir.), cert. denied, 449 U.S. 1021 (1980); *United States* v. *Kersting*, 891 F.2d at 1411 n.9) do not support the conclusion that compliance with a summons by a disinterested third party does not moot an appeal. In *Arthur Andersen & Co.*, the court of appeals held that an appeal from a summons enforcement order by an accounting firm that was not the target of the investigation was made moot by its compliance with the summons. In so holding, the court rejected the accountants' contention that their appeal fell within the category of cases that are excepted from mootness on the theory that they are "capable of repetition yet evading review." 623 F.2d at 723. As the court observed, as is the case with a party that is itself the target of a tax investigation, a third party "can refuse to comply and litigate the merits of the summons as a defense to a contempt citation." *Ibid.*[8] And, in *United States* v. *Kersting*, the court simply observed that it did not have a "disinterested third party" before it and thus expressed no opinion as to whether that would have any bearing on its analysis. 891 F.2d at 1411 n.9. Thus, nothing in *Arthur Andersen & Co.* or *Kersting* supports petitioner's claim that an appeal is not moot when a party other than the taxpayer complies with an IRS summons.

c. While we acknowledge that the Third Circuit's decision in *Gluck* is inconsistent with the numerous

[8] In *Arthur Andersen & Co.*, the court of appeals declined to decide whether a case involving a third party that lacked "sufficient incentive to risk contempt in order to avoid compliance with [a] summons" would present a "compelling circumstance[]" that would justify "deciding an otherwise moot case." 623 F.2d at 725. No court has held that a moot case becomes justiciable if "compelling circumstances" exist.

decisions of other circuits holding summons enforcement cases to be moot in these circumstances, it is unnecessary for the Court to resolve that conflict in this case. As Judge Garth stated in his dissent in *Gluck*, 771 F.2d at 759-760, the court's holding in that case conflicts with the earlier Third Circuit decision in *Vesco* v. *SEC*, 462 F.2d 1350 (1972). Judge Garth urged that this intracircuit conflict be resolved by that court en banc (771 F.2d at 761). Now that the position of the other circuits on this question has been made clear through intervening decisions, the Third Circuit should be given an opportunity to reconsider en banc its singular position on this issue before further review in this Court would be warranted.

3. Petitioner's contentions in this eight-year-old summons enforcement case ultimately are based on its demonstrably erroneous assumption that three questions concerning the validity of the summons remain unresolved. Each of the three arguments petitioner seeks to raise (Pet. 6) on the merits has previously (and finally) been decided against petitioner.

a. First, petitioner asserts (Pet. 6) that the IRS illegally obtained the partial transcripts of the tapes. As the court of appeals held in its opinion on remand from this Court, however, petitioner has previously waived any claims it may have concerning this issue (905 F.2d at 1346 n.2 (emphasis added)):

> The issue of the potential illegality of the transcripts, mentioned by the Supreme Court, *see Zolin*, 109 S. Ct. at 2624 n.5, is not properly before this Court. *The Church did not raise this issue in its original appeal, and we will not consider it on a later remand.*

b. Second, petitioner has previously litigated and lost on its argument (Pet. 6) that the district court should

have reviewed the full contents of the tapes before ordering them released to the government. Following the court of appeals' ruling on remand that the MCCS tapes fell within the scope of the crime-fraud exception, petitioner filed a petition for rehearing with suggestion for rehearing en banc in which it argued (at 11 n.8) that the district court should be required to review the tapes *in camera* prior to disclosure to ensure that the crime-fraud exception in fact applied. That petition for en banc rehearing was denied by the court of appeals on September 19, 1990, and this Court denied petitioner's subsequent petition for certiorari on this issue on March 18, 1991. 111 S. Ct. 1309.

c. Third, this Court has already rejected petitioner's further argument (Pet. 6) that, since the criminal component of the IRS investigation has been terminated and the civil component allegedly has been completed, there is no longer any legitimate purpose for the summons. *United States* v. *Zolin*, 491 U.S. at 557 n.3. Accord *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1522 n.1(9th Cir. 1986); *United States* v. *Zolin*, 809 F.2d at 1414. [9]

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[9] The IRS has the power to conduct an investigation for fraud at any time. See 26 U.S.C. 6501(c)(1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA and FRANK S. ZOLIN,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Church of Scientology of California ("the Church") respectfully submits this reply brief in further support of its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

ARGUMENT

I. The government expressly concedes that there is a conflict in the circuits "on the precise narrow issue presented here" -- whether an appeal is moot following disinterested third party compliance with an order enforcing an IRS summons. Brief in Opposition at 10 n.7 (hereinafter "Opp. at ___"); *id.* at 12-13; *compare Gluck* v. *United States*, 771 F.2d 750, 754 & n.3 (3d Cir. 1985), with the decision below, Appendix to Petition at 1a-2a (hereinafter "Pet. App. at ___"); *see*

Petition at 14-15. On this important question of the administration of the federal tax laws and the justiciability of appeals from district court orders enforcing government summonses and subpoenas, this concession alone is a sufficient ground for granting the petition. Sup. Ct. Rule 10.1(a).[1/]

The government's attempts to belittle this direct conflict on the precise and important issue presented here are without merit. Relying upon a dissent in *Gluck*, the government argues that the Third Circuit should "be given an opportunity to reconsider en banc" its position that compliance with an IRS summons does not moot an appeal. Opp. at 13. The government, however, ignores the fact that *Gluck* acknowledged the contrary decisions in other circuits, 771 F.2d at 754 n.3, and explicitly distinguished the earlier case upon which the government relies. *Id.* at 753-54 (discussing *Vesco* v. *SEC*, 462 F.2d 1350 (3d Cir. 1972)); Pet. at 19 n.7. Contrary to the government's suggestion, Opp. at 13, there have been no post-*Gluck* decisions that provide new or more compelling rationales than the pre-*Gluck* decisions that have held appeals moot in the circumstances presented here. *See* Opp. at 7-8. Indeed, in *dictum* in a previous case, the Ninth Circuit essentially agreed with *Gluck's* position concerning *disinterested* third party compliance. *See United States* v. *Kersting*, 891 F.2d 1407, 1411 n.9 (9th Cir. 1989), *cert. denied*, ___U.S.___, 111 S.Ct. 49 (1990). The government provides no reason to

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1/ Inexplicably, the government claims that petitioner denies that decisions which hold that compliance with a summons enforcement order moots an appeal involve instances of disinterested third party compliance. To the contrary, this petition is predicated precisely on this conflict between the Third Circuit and other circuits. *See* Pet. at 15 ("The court in *Gluck* noted that its 'holding perpetuates the conflict between this court and most other courts of appeals that have considered the issue.' [771 F.2d] at 754 n.3.").

believe that the Third Circuit would or should reconsider its decision.

Moreover, although *Gluck* is the only court to *hold* as it has on the precise issue presented here, at least three circuits have indicated in *dicta* that they would agree with *Gluck* in cases involving disinterested third party compliance. *See United States* v. *Arthur Andersen & Co.*, 623 F.2d 720, 723-24 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980); *United States* v. *Kis*, 658 F.2d 526, 534 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *Kersting, supra*, 891 F.2d at 1411 n.9; *see also Gluck*, 771 F.2d at 754 n.3; Pet. at 15-17. The government is correct that both *Arthur Anderson* and *Kersting* involved *interested* third parties, Opp. at 12 (*Kis* involved compliance by the taxpayers themselves, 658 F.2d at 533) , but it ignores the fact that these courts explicitly distinguish between compliance by disinterested and interested parties for purposes of mootness analysis. *See* Pet. at 15-18 (discussing cases). The government's conclusory assertion that whether compliance is by the taxpayer or by a disinterested third party is irrelevant to the question of mootness, Opp. at 11, ignores the distinction recognized by these cases, including that, unlike a taxpayer who has voluntarily complied with a summons enforcement order rather than risk contempt, a taxpayer who has no control over a disinterested third party's decision to turn over documents continues to have an adverse legal interest against the government concerning a definite and concrete live controversy. Pet. at 18-19.

Thus, regardless of *Gluck's* minority status, this Court should resolve the conflict in the circuits and adopt the holding in *Gluck* that compliance by a disinterested third party with a summons enforcement order does not moot an appeal, for the reasons stated in the petition; *see also* Point II, *infra*.

II. The government ignores the fundamental, well-settled principle that an appeal is not moot when "any effectual

relief" remains available to the appealing party. *Mills* v. *Green*, 159 U.S. 651, 653 (1895); Pet. at 10. Effective relief is available to the Church here by way of an order that the tapes and any documents derived from the tapes be returned to the custody and control of the district court and that any information derived therefrom not be further disclosed to any other persons or otherwise used by the IRS, which would effectively return the parties to the *status quo ante*. *See United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 422 n.6 (1983); *Gluck*, 771 F.2d at 753-54; Pet. at 11-15 (discussing cases). Because such effective relief is readily available should the Church prevail on its appeal from the district court's order, a decision by the court of appeals would not be an advisory opinion, but would resolve a "definite and concrete" "controversy between . . . parties" that retain "adverse legal interests" on the relevant issues. *See DeFunis* v. *Odegaard*, 416 U.S. 312, 317 (1974) (internal quotations omitted); Pet. at 11-12, 17-19.

In response to the obvious availability of this effective relief, the government disingenuously asserts that "a decision reversing an enforcement order could not alter the fact that the records have been produced and could not erase the knowledge obtained from those records." Opp. at 8. The government, however, carefully avoids any mention of the fact that *twice* previously in this case the IRS has obtained access to the tapes following erroneous court orders, and both times the district court ordered the tapes and any notes or copies of the tapes returned to its custody and control. Pet. at 3, 5-6, 12, 19 n.7; Pet.App. 8a, 47a-49a. On neither occasion did the government or the lower courts suggest that this court-authorized IRS access to the tapes rendered the case moot or that return of the tapes did not constitute "effectual relief" merely because one could hypothesize various ways in which the *status quo ante* was not precisely restored. The government, by its studied silence on this issue, effectively concedes that there is no principled reason why such relief, effective

twice previously in this very case, would not constitute "effectual relief" now.

The government also misconstrues this Court's decision in *Sells, supra*, in an attempt to create a nonexistent distinction between that decision and the instant matter. The appeal in *Sells* did not involve "allegations of impropriety in the [government's] disclosure of grand jury materials" or improper future violations of grand jury secrecy. Opp. at 10-11. In *Sells*, as here, the government properly sought and obtained a district court order *before* the grand jury material was disclosed to Civil Division attorneys. 463 U.S. at 421-22. The appeal from that order did not allege that the disclosures violated the district court's order, but rather that the order erroneously permitted Civil Division attorneys to obtain the documents. *Id.* at 422. As in *Sells*, the issue here is whether the district court erroneously ordered documents turned over to certain government officials and, if so, what shall be the remedy. The simple truth is that there is no relevant distinction between *Sells* and the instant case on the mootness issue, including the availability of effective relief. The government's resort to the fiction that *Sells* involved a challenge to government improprieties, rather than an appeal of an erroneous district court order, only serves to highlight that *Sells* directly controls resolution of the instant matter.

Underlying the government's opposition is the incorrect assumption that a taxpayer suffers no harm when a district court erroneously orders a disinterested third party to deliver documents to the IRS and the IRS then obtains the documents. Opp. at 8-11. Based on this incorrect view, the government contends that any possible harm to the taxpayer can be cured by a suppression hearing at some future date should the government proceed against the taxpayer, and that any earlier ruling cannot possibly affect the interests of the taxpayer. Congress, however, rejected this view when it enacted legislation in 1976 to permit a taxpayer challenge to

an IRS summons directed at a disinterested third party. *See* 26 U.S.C. § 7609. This legislation recognizes that the taxpayer may suffer substantial harm when the IRS has improper or unlawful access to the citizen's private papers; when it discloses them to other individuals; when it uses those papers to conduct a potentially intrusive and embarrassing investigation of a taxpayer; and when it brings a criminal or civil tax proceeding dependent on improperly obtained and ultimately suppressed documents.

Indeed, if the government's view were correct, then there would be no reason to permit any taxpayer challenge to a third-party summons. The IRS would issue the summons and the disinterested party would be required to produce the documents. Any challenge would have to await some future proceeding in which the IRS sought to admit the documents against the taxpayer. Certainly, a district court order -- whether or not erroneous -- that a summons to a disinterested party should be enforced is no more "advisory" or "speculative" than an appellate court ruling on this issue. Pet. at 20-22. The possible availability of a future proceeding in which the taxpayer may make a suppression motion is simply irrelevant to the present mootness inquiry. And because of the ready availability of effective relief, *see Sells, supra; Gluck, supra,* nothing in the mootness analysis turns on whether the government has already obtained the documents from the disinterested third party.

III. The government contends that petitioner's arguments on the underlying merits of its appeal to the court below are "demonstrably erroneous." Opp. at 13. The *merits* of an underlying appeal, of course, are irrelevant to the issue of mootness. The Church has addressed the merits of its appeal in a 34-page brief filed with the court below in July 1991; although it can hardly duplicate that discussion here, a brief response to the government's assertion that the issues on

appeal have been finally decided against the Church, Opp. at 13-14, is necessary.

First, the district court originally rejected as irrelevant any inquiry into the question whether the government had lawfully obtained the partial transcripts. Pet. at 4. Subsequently, this Court held that the issue was relevant and noted that it remained unresolved. *United States* v. *Zolin*, 491 U.S. 554, 559 n.5, 575 (1989). Although the court below did not address the question, its remand order clearly contemplated that this issue would be raised in the district court. Pet. at 5; Pet. App. 15a & n.2. The district court, however, erroneously ruled that the court of appeals had *sub silentio* foreclosed any inquiry into this issue. Pet. at 6-7; Pet. App. 8a-11a. Thus, *no* court has ever addressed whether the partial transcripts were lawfully obtained.

Second, the question whether there is at present a legitimate purpose for the summons is not foreclosed by prior decisions that the government's previous appeal was not moot. Opp. at 14. Rather, the issue turns on recent admissions by IRS agents that, while the IRS had the partial transcripts in its possession, and while this case was pending in the courts, the IRS had *terminated* the investigation upon which the summons was based. *See United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); *United States* v. *LaSalle National Bank*, 437 U.S. 298, 313-14 (1978); 26 U.S.C. § 7602(a); Pet. at 6.

Third, even assuming that the question whether the district court "should be *required* to review the tapes *in camera* prior to disclosure" has been resolved, Opp. at 14 (emphasis added), that is not the issue presented below. The district court mistakenly ruled that the court of appeals had foreclosed such review. Pet. App. 3a-4a. The Church's appeal asserts that the district court erred in its belief that the court of appeals had removed the district court's *discretion* to review the tapes *in camera*, *see Zolin*, 491 U.S. at 572, particularly

given that no court has reviewed the tapes prior to ordering their release.

In short, the appeal below raises serious, meritorious unresolved issues that should not be foreclosed because of disinterested third party compliance with a summons enforcement order, which can be effectively remedied by the court below should the Church prevail on its appeal.

CONCLUSION

For the reasons stated herein and in the Petition, the petition for a writ of certiorari should be granted.

Dated: New York, New York
February 14, 1992

Respectfully submitted,

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(4)

No. 91-946

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA and FRANK S. ZOLIN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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Dated: May 1, 1992

QUESTION PRESENTED

Whether the decision of the Court of Appeals -- which conflicts with decisions of this Court and of other courts of appeals -- was in error in dismissing petitioner's appeal as moot following compliance by a disinterested third party with an IRS summons enforcement order, although effectual relief remains available to the petitioner through return of documents and prohibition on the government's future use of the documents?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.1 LIST

The parties to the proceedings below were:

The Church of Scientology of California
United States of America
Frank S. Zolin

Petitioner Church of Scientology of California has no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1.

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No. 91-946

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

v.

UNITED STATES OF AMERICA AND FRANK S. ZOLIN,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The order of the court of appeals dismissing the appeal as moot (Pet. App. 1a-2a)[1/] is unreported. The March 13, April 15, and May 21, 1991, orders of the district court (Pet. App. 3a-11a) are unreported. A prior opinion and order of the court of appeals (Pet. App. 13a-15a), reported at 905 F.2d 1344 (9th Cir. 1990), *cert. denied*, ___U.S.___, 111 S.Ct. 1309 (1991), and the unreported order of the court of appeals denying rehearing and a suggestion for rehear-

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1/ "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari, filed on December 9, 1991.

ing *en banc* (Pet. App. 12a), followed the remand from this Court in *United States* v. *Zolin*, 491 U.S. 554 (1989). The order of the *en banc* court of appeals, issued prior to this Court's decision, vacating the order granting rehearing (Pet. App. 18a-26a) is reported at 842 F.2d 1135. A subsequent concurrence to that order (Pet. App. 16a-17a) is reported at 850 F.2d 610. The earlier order of the *en banc* court of appeals granting rehearing (Pet. App. 27a) is reported at 832 F.2d 127. The initial opinion of the court of appeals panel (Pet. App. 28a-41a) is reported at 809 F.2d 1411. The April 30, 1985, order of the district court (Pet. App. 44a-46a), and the June 10, 1985, order of the district court denying reconsideration (Pet. App. 42a-43a) are unreported.

JURISDICTION

The final judgment of the court of appeals was entered on September 10, 1991 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 9, 1991, and was granted on March 2, 1992 (112 S.Ct. 1261). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the Constitution of the United States provides in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to Controversies to which the United States shall be a Party. . . ."

STATEMENT OF THE CASE

1. The MCCS tapes, which are the subject of this litigation, involve two confidential attorney-client conversations held in July 1980 between lawyers and representatives of the Church of Scientology of California ("the Church") and L. Ron Hubbard. The tapes were wrongfully obtained by Gerald Armstrong,

a former adherent of the Scientology religion, in the early 1980's. *See Zolin*, *supra*, 491 U.S. at 557. The tapes, along with thousands of other documents that had been in the custody of the Church either as owner of the property or as bailee for Mr. Hubbard, and which were wrongfully obtained by Armstrong, were eventually ordered placed under seal in the custody of the Los Angeles County Superior Court in *Church of Scientology of California* v. *Armstrong* (No. C420153). *See Zolin*, 491 U.S. at 557. On October 24, 1984, the IRS served the subject summons on the Los Angeles County Clerk, who also serves as the Clerk of the Los Angeles County Superior Court, which summons sought production of numerous exhibits held under seal in the pending *Armstrong* case. *See id.* On November 21, 1984, the County Clerk complied with the IRS summons despite extant sealing orders, and made the tapes, as well as other sealed documents, available to the IRS, which made copies, reviewed, and took notes of the tapes. *See id.*; Pet. App. 48a; E.R. 2-4.[2/]

On November 27, 1984, the district court, in *Church of Scientology* v. *Armstrong*, No. CV 84-9003-HLH (C.D.Cal.), ordered the IRS to place the copies of the tapes and any notes made from them, as well as the other sealed documents, in the custody of the district court, because the County Clerk had erroneously made the sealed tapes available to the IRS (Pet. App. 47a-49a); *Zolin*, 491 U.S. at 557-58; E.R. 15-17. The government did not argue at that time that the County Clerk's compliance with the summons made the Church's proceeding for the return of the tapes moot. The IRS complied with the district court's order on or about November 29, 1984 (Pet. App. 48a); E.R. 4. The original tapes remained under seal in the custody

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[2/] "E.R." refers to Appellant's Excerpts of Record filed by the Church in the court below.

of the Superior Court, and on January 22, 1985, the district court ordered that the copies and notes also be returned to the Superior Court's custody (Pet. App. 47a-49a).

2. On January 18, 1985, the government commenced this proceeding, pursuant to 26 U.S.C. §§ 7402, 7602 and 7604, by filing a petition in the district court to enforce the summons served upon the Los Angeles County Clerk (Pet. App. 29a); *Zolin*, 491 U.S. at 558; E.R. 1-22. The Church, asserting its own privacy and proprietary interests as owner of the documents, its interests as bailee for the interests and rights of Mr. Hubbard, and as attorney-client privilege-holder, intervened in the district court, pursuant to 26 U.S.C. § 7609, to oppose enforcement of the summons on various grounds, including that the MCCS tapes are protected by the attorney-client privilege (Pet. App. 29a); E.R. 70, item 7. The government stated that it did not oppose the motion to intervene, which was granted on February 20, 1985. E.R. 70, item 11.

The government asserted that the crime-fraud exception to the privilege applied to the MCCS tapes. A key issue in this litigation has been whether a transcript of the tapes obtained by the IRS could be considered in determining the crime-fraud question, and if so, whether the exception was established. As one element of this issue, the Church attempted to raise the question whether the government had obtained the partial transcript unlawfully through violation of the Superior Court sealing orders. The district court, however, precluded the Church from presenting evidence on this issue, finding it irrelevant. E.R. 26-34. The court then ruled in the Church's favor on the merits of the crime-fraud issue *after* reviewing the transcript (Pet. App. 45a). Whether the transcript could be reviewed and whether the crime-fraud exception applied to the tapes was extensively litigated in

the district court (Pet. App. 42a-46a), in the court of appeals (Pet. App. 16a-41a), and in this Court, *Zolin*, 491 U.S. 554.

In *Zolin*, this Court held:

> Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

Id. at 572 (internal quotations and citations omitted). This Court further held that "the threshold showing to obtain *in camera* review may be met by using any relevant evidence, *lawfully obtained*, that has not been adjudicated to be privileged." *Id.* at 575 (emphasis added). This Court noted that whether the government had lawfully obtained the partial transcript was unresolved. *Id.* at 559 n.5.

3. On remand from this Court, the court of appeals reviewed the transcript and stated that it "appear[ed] to" establish the crime-fraud exception (Pet. App. 15a). The court then stated, "On remand the district court should admit the MCCS tapes into evidence, subject to any objections the parties might make at that time." (Pet. App. 15a).[3/] In a footnote to this statement, the court of appeals specifically noted that *it* had not reached the issue whether the transcript was lawfully obtained because "[t]he Church did not raise this issue in its original appeal" (Pet. App. 15a n.2) (emphasis added). The court of appeals

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3/ There is in fact no proceeding into which the tapes may be admitted.

appeared to be confused about the procedural posture of the case, as the Church had prevailed on the tapes issue in the district court; the government had appealed the decision, *not* the Church. In any event, the court of appeal's decision did not preclude the district court from resolving an issue that the Church had raised, but which the district court had refused to address, erroneously believing it to be irrelevant, and which had been unnecessary to the district court's original decision.

The Church's petition for rehearing and suggestion for rehearing *en banc* was denied on September 19, 1990 (Pet. App. 12a). Its petition for a writ of certiorari was denied on March 18, 1991. *Church of Scientology of California* v. *United States*, ___U.S. ___, 111 S.Ct. 1309 (1991).

4. On January 14, 1991, while the Church's petition for a writ of certiorari was *sub judice* in this Court, the government, without notice to the Church, moved in the district court for access to the MCCS tapes. E.R. 74, item 58. On January 17, again without notice to the Church, the district court ordered that the tapes in the possession of the Superior Court be made available for inspection and copying by the government. E.R. 40-41. On January 23, 1991, the government obtained an *ex parte* order from the Superior Court, which ordered the County Clerk to comply with the district court's enforcement order. E.R. 42-43. That same day, the County Clerk made the tapes available to the government, which then made copies of the tapes.

The Church did not learn of these *ex parte* proceedings until February 1, 1991. The Church then moved for return of the tapes on the grounds that: 1) the district court's April 30, 1985 stay order remained in effect (Pet. App. 45a-46a); 2) the government had failed to give the Church notice of its attempt to

obtain the tapes on January 14, 1991; and 3) several important issues remained for resolution on remand. On March 13, 1991, the district court ordered that any copies of the tapes and any notes or transcripts in the possession of the government be returned to the district court (Pet. App. 7a-8a, 11a). On March 14, 1991, the government complied with that order. E.R. 75, item 77. Again, the government did not argue that the case was moot because the County Clerk had complied fully with the district court's enforcement order and the government had obtained the tapes.

In the district court, the Church opposed enforcement of the summons on three grounds: (1) the question whether the IRS obtained the transcript in a lawful manner remained to be decided, pursuant to the remand of this Court and the court of appeals; (2) testimony in January 1991 of the relevant IRS agents revealed that the investigation of the IRS' Criminal Investigation Division, pursuant to which the summons for the tapes was issued in October 1984, had been terminated, and that the civil component of the IRS' tax examination had been completed; thus, in the absence of any investigation whatsoever, there remained no legitimate investigatory purpose for the summons, *see United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); 26 U.S.C. § 7602(a); and (3) the district court should review the tapes themselves *in camera* (which no court has ever done) to assure that their release would not violate the attorney-client privilege, consistent with the procedure urged by the three dissenting judges in the court of appeals' *en banc* order vacating the order granting *en banc* review (Pet. App. 24a-26a).

The district court refused to consider any of the Church's arguments on their merits. Instead, in an extremely convoluted analysis, it held that the court of appeals, although concededly not addressing any of

these issues directly, had precluded the district court's consideration of them when it resolved the attorney-client privilege issue (Pet. App. 3a-4a, 8a-11a). Following this Court's denial of the Church's petition for a writ of certiorari on March 18, 1991, the district court, by order dated April 15, 1991, ordered that the tapes be delivered to the IRS (Pet. App. 5a-6a). The district court refused to stay its order pending appeal, but did grant a 21-day stay to permit the Church to seek a stay from the court of appeals (Pet. App. 6a).

5. The Church filed a timely notice of appeal and sought a stay of the district court's order in the court of appeals on April 25, 1991. That court denied the Church's stay application on May 6, 1991, but granted the Church a 7-day stay to permit the Church to seek a stay from this Court. On May 8, 1991, Circuit Justice Sandra Day O'Connor denied the Church's application for a stay.

Following these denials, the Church moved on May 16, 1991, to expedite its appeal. On May 21, before the court acted on this motion, the district court ordered that the government could obtain the copies of the tapes held by the district court (Pet. App. 3a-4a), and soon thereafter the government obtained those copies. On May 24, 1991, the Church filed a renewed emergency motion for a stay seeking same day relief. Emergency relief was denied that day, and the motion was denied on May 30, 1991. On May 31, 1991, the court denied the Church's second renewed emergency motion for a stay pending appeal, filed on that date.

On May 30, 1991, the court of appeals also ordered that the Church show cause why its appeal should not be dismissed as moot on the ground that

the IRS had obtained the tapes.[4/] Following briefing on this issue, on September 10, 1991, the court of appeals dismissed the Church's appeal as moot, holding that, "Because it is undisputed that the tapes have been turned over to the IRS in compliance with the summons enforcement order, no controversy exists presently and this appeal is moot. *See United States* v. *Kersting*, 891 F.2d 1407, 1410 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 49 (1990)" (Pet. App. 2a). The order contained no further analysis or reasoning. The meritorious issues that the Church raised in the district court and on appeal from the district court's order have never been addressed.

SUMMARY OF ARGUMENT

I. The court of appeals erred in dismissing petitioner's appeal as moot following disinterested third party compliance with a district court order enforcing an IRS summons. The federal courts have long held that an appeal is not moot when adverse parties continue to have a live, concrete legal interest in the outcome of the litigation and the court may grant effectual relief, even if it is not complete and perfect relief or the precise relief requested in the initial proceedings. In this case, such relief is readily available through return of all copies of the tapes and no further use of any information derived from them. Indeed, such relief has been granted twice previously

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4/ On June 11, 1991, the court granted the Church's motion to expedite the appeal. The Church submitted its brief on the merits and Excerpts of Record on July 9, 1991, while the mootness issue was *sub judice*. The government, however, never submitted its brief on the merits, originally due July 30, 1991, as the court did not rule on the government's request for an extension of time to file its brief until it ruled that the appeal was moot (Pet. App. 2a).

in this proceeding, with no claim by the government—that this access to the tapes rendered this case moot.

II. Contrary to the government's unfounded assertion, the Church's claim that this appeal is not moot because of the availability of effective relief is not novel. The Church's position is consistent with several decisions of the Third Circuit involving IRS summons enforcement orders, with closely analogous decisions of this Court and several courts of appeals involving court-ordered government access to documents related to grand jury proceedings, and with court orders enforcing Federal Trade Commission subpoenas. These decisions consistently have recognized that a case is not moot even after disclosure of documents to the government because the federal courts can order no further disclosures, no further use, and return of the documents.

III. Even if this Court were to conclude that compliance with a summons enforcement order by the taxpayer himself or by another interested party would render an appeal by the complying party moot -- because an interested party may choose to refuse to comply and challenge the underlying order in a contempt proceeding -- an appeal by an interested party should not be held moot following compliance with an IRS summons enforcement order by a disinterested third party, as occurred in this case. The Church emphasizes that it is not seeking an equitable exception to the mootness doctrine, but rather that disinterested party compliance does nothing to remove the interested party's adverse concrete interest in the outcome of a litigation for which effective relief may be granted. Several courts in summons enforcement cases have recognized that it is unreasonable to expect a disinterested third party to refuse to comply and to be held in contempt and that the interested party's right to appeal should not turn on the fortuity of the

location of the documents. These cases are consistent both with this Court's decisions recognizing that jurisdictional requirements must be interpreted to protect an interested party's right to appeal when faced with court orders directing disinterested parties to produce documents, and with legislation that provides interested parties with an absolute right to intervene to contest an IRS summons enforcement proceeding directed at a disinterested party.

IV. The government's arguments, like the cases upon which the government relies, fail to address the crucial issue -- the availability of immediate effective relief through prohibiting the use of the documents and requiring their return. Instead, those few cases that contain any analysis of the issue focus on a past event -- disclosure of the documents -- or a speculative future event -- admission of the documents in evidence in a proceeding brought by the IRS. These cases simply ignore the very serious harms that the taxpayer suffers, as recognized by Congress and the decisions discussed in Point II, *infra*, when the IRS has improper or unlawful access to the citizen's private, proprietary papers, and when it uses those papers to conduct a potentially intrusive and embarrassing investigation of a taxpayer, which may lead to a criminal or civil tax prosecution dependent on the improperly obtained documents.

ARGUMENT

I. AN APPEAL IS NOT MOOT WHEN, AS HERE, EFFECTIVE RELIEF IS AVAILABLE TO THE PREVAILING PARTY

As this Court has recently reiterated, "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Determination of whether a particular case is moot has long rested on two interrelated considera-

tions: whether there is an actual live, concrete controversy between the parties and whether the courts may grant any effectual relief to the prevailing party. Analysis of these two issues demonstrates that this case is not moot because the parties are clearly engaged in a live concrete controversy over the propriety of IRS access to and use of the tapes and because effective relief may be granted to the Church should it ultimately prevail, by requiring the IRS to return all copies of the tapes and to make no further use of any information derived from them.

Although this Court has used various formulations, the basic principle that the parties must retain a real, legal interest in the outcome of the controversy has long been settled. For example, in *County of Los Angeles* v. *Davis*, 440 U.S. 625 (1979), this Court declared, "'Simply stated, a case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Id.* at 631 (quoting *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969)). In *Davis*, the Court found a case had become moot when "interim relief or events have *completely and irrevocably* eradicated the effects of the alleged violation." 440 U.S. at 631 (emphasis added). Using somewhat different language, in *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), this Court restated the principle that a case is moot when "[t]he controversy between the parties has . . . ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse legal interests.'" *Id.* at 317 (quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-41 (1937)); *see also Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 571 (1984) ("As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot. . . ."). This Court has consistently held that "[t]he burden of demonstrating mootness 'is a heavy one.'" *Davis*, 440 U.S. at 631

(quoting *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953)); *see Stotts*, 467 U.S. at 570.

Here, the controversy between the Church and the government over the subject matter of this case -- government access to and use of the MCCS tapes -- remains "definite and concrete," *DeFunis*, 416 U.S. at 317, and the parties continue to have "adverse legal interests," *id.*, and "a legally cognizable interest in the outcome," *Davis*, 440 U.S. at 631. The Church, for its part, continues to maintain that the IRS has no right to possess or use its tapes to pursue an alleged civil tax fraud investigation and it seeks to prevent continued IRS possession and use of its tapes. The government, on the other hand, asserts a continuing interest in possessing and using the tapes in furtherance of an alleged investigation of the targets of the initial summons.[5/] Thus, the parties are as "adverse" now as they were at the initiation of this litigation, and the dispute remains as "definite and concrete" as ever. And, as shown in Points II and III, *infra*, the parties retain "a concrete interest in the outcome of the litigation." *Stotts*, 467 U.S. at 571. The government has utterly failed to meet its "heavy burden" of demon-

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[5/] Whether the IRS in fact wholly abandoned and terminated the investigation upon which the summons was based *prior* to obtaining the tapes in May 1991 is a question raised by the Church in the district court and the court of appeals, which has never been addressed on the merits. The government does not appear to contend that there is an actual ongoing investigation to which the tapes remain relevant, but rather that "[t]he IRS has the *power* to conduct an investigation for fraud at anytime." Government Brief in Opposition at 14 n.9 (emphasis added). Whether this is a sufficient basis to establish a legitimate investigatory purpose for enforcement of an IRS summons, pursuant to *Powell*, *supra*, should be addressed on the merits by the lower courts.

strating that this case is moot, and nothing in the opinion of the court below even purports to explain why there is no longer a "live" controversy between the parties.

The second, interrelated mootness inquiry is the availability of effective relief. Indeed, "[t]he central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief . . . courts must be careful to appraise the full range of remedial opportunities." 13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3533.3, at 261 (2d ed. 1984).

In determining whether interim events have rendered an appeal moot, the federal courts historically have refused to limit their consideration to whether the precise relief that the parties originally sought is still available. Rather, the courts determine whether an event has occurred "which renders it *impossible* for this court . . . to grant [a party] *any effectual relief whatever.*" *Mills* v. *Green*, 159 U.S. 651, 653 (1895) (emphasis added). The courts of appeals continue to cite *Mills* for this basic principle. *See, e.g., In re Stadium Management Corp.*, 895 F.2d 845, 848 (1st Cir. 1990); *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 841 F.2d 92, 95-96 (4th Cir. 1988); *Garcia* v. *Lawn*, 805 F.2d 1400, 1402 (9th Cir. 1986); *Jersey Central Power & Light Co.* v. *Township of Lacey*, 772 F.2d 1103, 1108 (3d Cir. 1985), *cert denied*, 475 U.S. 1013 (1986); *In re De Lorean Motor Co.*, 755 F.2d 1223, 1226 (6th Cir. 1985); *see also Rustad* v. *United States Air Force*, 718 F.2d 348, 350 (10th Cir. 1983) (case is not moot although "immediate relief sought . . . is no longer possible . . . . [T]hat is not necessarily the only relief which could be fashioned by this Court should Rustad prevail on the merits"); *Pyramid Lake Paiute Tribe* v. *Hodel*, 882 F.2d 364, 368 (9th Cir. 1989). Simply stated, "decision should not be denied if a worthwhile remedy can be given," 13A Wright, Miller, & Cooper, *supra*, § 3533.3, at 278; *i.e.*, a case is not moot when the court has the "ability to undo the effects of conduct that was not prevented by the time of decision," *id.* at 279 & n.36 (citing cases).

This well-settled doctrine that mootness does not turn on the availability on appeal of the precise relief originally requested is reflected in decisions interpreting Fed. R. Civ. P. 54(c), which flexibly provides in pertinent part that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief* in the party's pleadings" (emphasis added). As one court has stated in rejecting an argument that an appeal was moot because the originally requested relief was no longer available, "The rule [54(c)] requires that a court ascertain whether the plaintiffs are entitled to *any* remedy, not whether they have asked for the proper remedy." *Kirby* v. *United States Government*, 745 F.2d 204, 207 (3d Cir. 1984) (emphasis original); *see also Detroit, Toledo & R. Co.* v. *Consolidated Rail Corp.*, 767 F.2d 274, 279 (6th Cir. 1985).

On this appeal, the Church has contended that, should it ultimately prevail on the merits, it is entitled, at the very least, to return of all copies of its tapes to the custody of the state Superior Court, and to have the IRS make no further use of information derived from its tapes. If such relief were granted, it would constitute "effectual relief" and would essentially, if not perfectly, restore the parties to the *status quo ante*.

Indeed, *twice* previously in this very case, the IRS obtained access to the tapes following erroneous court orders, and both times the district court ordered the tapes and any notes or copies of them returned to

the custody and control of the district court (Pet. App. 8a, 47a-49a); *Zolin*, 491 U.S. at 557-58. At no time did the government, the lower courts, or this Court suggest that this court-authorized IRS access made the case moot or that return of the tapes did not constitute "effectual relief" merely because one could hypothesize that the *status quo ante* was not perfectly restored. In fact, so "effectual" was the relief afforded by the two earlier orders that the government continued to press its claim for renewed access to the tapes, and the Church continued to resist that claim.

Now the government contends that "a decision reversing an enforcement order could not alter the fact that the records have been produced and could not erase the knowledge obtained from those records." Opp. at 8. This contention ignores the long-settled doctrine that the issue is the availability of "any effectual relief," not precise restoration of the *status quo ante*. *See, e.g., Cardwell* v. *Kurtz*, 765 F.2d 776, 779 (9th Cir. 1985) (although court cannot "purg[e] the memories of government agents, [that] would not justify a refusal to grant as much relief as possible"). It further conveniently ignores the fact that the same could have been said on the two previous occasions when the government obtained the tapes. The government has failed to present any principled reason why such relief, effective twice previously to restore the *status quo* in this very case, would not constitute effectual relief now.

II. NUMEROUS COURTS HAVE HELD THAT GOVERNMENT ACCESS TO DOCUMENTS DOES NOT RENDER AN APPEAL MOOT

In IRS summons enforcement cases and in closely analogous situations involving government subpoenas or other government efforts to obtain documents, numerous courts, including this Court, have held that an appeal from a court order granting the

government access to documents does not become moot once the government obtains the documents, because the court can order the government to return the documents or to make no further use of them. These cases recognize that government access does not end the controversy; the parties retain adverse legal interests in the outcome because effective relief remains available to the government's target. As there is no reason why like relief cannot be ordered in this case should the Church ultimately prevail on the merits of its appeal, this case is not moot.

In *Gluck* v. *United States*, 771 F.2d 750 (3d Cir. 1985), for example, the Third Circuit held that full compliance by a bank with an order enforcing an IRS summons did not moot the appeal by the Glucks, the intervening taxpayers. The court reasoned that "the surrendering of the documents [by the bank] to the IRS does not end the controversy *between the parties* because, if we find that the summonses were illegal, we can still fashion a remedy -- *prohibition of the use of the summoned documents* -- to afford the Glucks effective relief." *Id.* at 754 (emphasis added). The court distinguished the situation in *Gluck* from a case such as *Vesco* v. *SEC*, 462 F.2d 1350, 1351 (3d Cir. 1972), in which the very act of disclosing the documents to the government gave rise to irreversible, irremediable harm to Vesco -- possible criminal liability under Swiss bank secrecy law for the act of disclosing the documents to the SEC -- which the federal courts had no power to cure. *See Gluck*, 771 F.2d at 754. Similarly, in *United States* v. *Waltman*, 525 F.2d 371 (3d Cir. 1975), another IRS summons enforcement matter, the court stated, "Because a stay was denied, the diary was produced. However, the case is not moot since if the diary is not a corporate record, the individual respondent is entitled to its return and appropriate suppression *of the use* of its contents." *Id.* at 373 n.1; *see also United States* v. *Friedman*, 532

F.2d 928, 931 (3d Cir. 1976) (compliance by third parties with IRS summons enforcement order does not moot taxpayer-intervenor's appeal because the court can prevent further use of the records; "the controversy between the IRS and the taxpayers over these records is still very much alive.").[6/]

In a somewhat different context involving the IRS, in *Cardwell* v. *Kurtz*, *supra*, the appellants claimed that the IRS had illegally taken business information during an audit and had incorporated the information in audit reports. 765 F.2d at 779. "Part of the relief requested by the plaintiffs is that the government simply give back what it took illegally." *Id.* The Ninth Circuit held the appeal was not moot because "the district court's inability to effect complete relief, which would include purging the memories of government agents, would not justify a refusal to grant as much relief as possible -- ordering the government to divest itself of the embodiment of the illegally seized information that could be used to refresh those memories." *Id.*

In *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983) ("Sells"), in a situation very similar to the instant controversy, this Court held that an appeal involving access to and use of grand jury documents was not moot because of the availability of effectual relief. In *Sells*, the government sought and obtained a district court order that permitted the disclosure of grand jury materials to attorneys in the Civil Division of the Justice Department. Sells had sought to

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6/ The Church acknowledges that the Third Circuit view represents a minority position in IRS summons enforcement matters. *See* Point IV, *infra*. Nevertheless, the Third Circuit has correctly applied basic mootness principles and its position is consistent with numerous decisions in analogous contexts as set forth, *infra*.

prevent such disclosure. After the district court and the court of appeals refused to stay disclosure pending Sells' appeal,

> the Civil Division attorneys and their assistants enjoyed access to the grand jury materials for more than two years while this case was pending in the Court of Appeals. . . . The Government argued in the Court of Appeals that the case was moot because the disclosure sought to be prevented had already occurred.

Id. at 422 n.6. Despite this disclosure two years earlier, however, this Court held:

> The Court of Appeals correctly rejected the contention:
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> "The controversy here is still a live one. By its terms the disclosure order grants access to all attorneys for the Civil Division, their paralegal and secretarial staff, and all other necessary assistants. Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but we can grant *partial relief by preventing further disclosure*." *In re Grand Jury Investigation No. 78-184* (*Sells, Inc.*), 642 F.2d [1184,] 1187-1188 [(9th Cir. 1981)].

463 U.S. at 422-23 n.6 (emphasis added). The court of appeals had also ordered the district court to "take such steps as are . . . necessary to protect the appellants from the effects of past disclosure." 642 F.2d at 1192.

Applying the principles of *Sells* and *Mills* to this case, it is clear that "[t]he controversy here is still a live one," *id.* at 422 n.6, because it is obviously *not* "impossible for this court . . . to grant [a party] any effectual relief whatever." *Mills*, 159 U.S. at 653. As in *Sells*, the issue here is whether the district court erroneously ordered documents turned over to certain government officials and, if so, what shall be the remedy. The simple truth is that there is no relevant distinction between *Sells* and this case on the mootness issue, including the availability of effective relief.[7/] An order preventing further disclosure or use of the tapes and requiring their return would effectively return the parties to the *status quo ante*. While such relief is not "the precise relief sought" in the district court, *Pyramid Lake*, 882 F.2d at 368, it certainly is "effectual relief," *Mills*, 159 U.S. at 653, and "partial relief," *Sells Engineering*, 463 U.S. at 423 n.6, to which the Church would be entitled, should it prevail on the merits. *See id.*

7/ The government has claimed incorrectly that the appeal in *Sells* involved "allegations of impropriety in the [government's] disclosure of grand jury materials" and improper future violations of grand jury secrecy. Opp. at 10-11. In fact, however, the government sought and obtained a district court order that grand jury materials could be disclosed to Civil Division attorneys before any disclosures took place. 463 U.S. at 421-22. There was no issue on appeal from that order that the disclosures violated the terms of the district court's order, or that government officials had engaged in improprieties, but rather that the court's order was in error in permitting Civil Division attorneys to obtain the documents. *Id.* at 422. The government's resort to the fiction that *Sells* involved a challenge to government improprieties, rather than an appeal of an erroneous district court order, only emphasizes that *Sells* directly controls resolution of the mootness issue in the instant matter.

The courts of appeals have also recognized that their ability to order the return of documents obtained through grand jury subpoenas prevents post-compliance appeals from being moot. In *In re Grand Jury Subpoena Dated June 5, 1985* (*Doe*), 825 F.2d 231 (9th Cir. 1987), for example, attorney Doe moved to quash a grand jury subpoena issued to him, which concerned possible criminal activities by both Doe and his client Roe. Doe then delivered attorney-client documents to the court for its *in camera* review in determining the motion. The court then denied the motion to quash and delivered the documents to the government, which presented them to the grand jury, which indicted the client Roe, but not Doe. The Ninth Circuit, relying on both its and this Court's decisions in *Sells*, *supra*, held:

> The grand jury has not indicted Doe; the continued possession and control of the documents by the grand jury places Doe at risk of being indicted. *Cf. Sells*, 642 F.2d at 1187-88. . . . we can diminish this risk *by ordering the return of all of the documents*. *Sells*, 463 U.S. at 422 n.6 . . . . Under our reasoning in *Sells*, Doe's appeal is not moot.

825 F.2d at 235. The court in *Doe* distinguished Roe's appeal, holding that Roe's appeal was moot because Roe "has been indicted; we cannot unring that bell." *Id.* at 234 (internal quotations omitted).

In the instant matter, the IRS has not moved to bring any indictments or civil proceedings based on this summons. The government itself contends, however, that it intends to use the tapes to determine whether to initiate a possible civil prosecution for fraud. Opp. at 14 n.9. This appeal, therefore, is no more moot

than was Doe's.[8/] The targets here are in precisely the same position as Doe, who was permitted to pursue his appeal in the court of appeals even after the government had obtained and made use of the documents. *See also United States* v. *Fischbach and Moore, Inc.*, 776 F.2d 839, 841 n.2 (9th Cir. 1985) (disclosure of grand jury transcripts to civil litigants "does not render this appeal moot. . . . because of harm caused by continuing disclosure") (citing *Sells*, 463 U.S. at 422 n.6)); *cf. In re Federal Grand Jury Investigation* (*McElroy*), 718 F.2d 875, 876 (8th Cir. 1983) (appeal of order authorizing disclosure of federal grand jury transcript to state prosecutor held moot where transcript had been disclosed, state prosecutor had completed his review, had returned the transcript to the custody of the district court, had retained no copies, had instituted no criminal proceedings, and the government had represented it would make no further disclosures absent a new court order).

The courts of appeals have also consistently held that appeals from court orders enforcing Federal Trade Commission subpoenas are not rendered moot after the government has obtained the subpoenaed documents, due to the availability of "effectual relief" through return of the documents or preventing further disclo-

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8/ The court in *Doe* ultimately held that it had no jurisdiction over Doe's appeal because the denial of the motion to quash was not an appealable order, 825 F.2d at 235-36, and that Doe, who was a target of the grand jury, could have refused to comply and challenged the denial in a contempt proceeding. 825 F.2d at 235-36. The court noted, however, that had Doe been "a third-party attorney who cannot be expected to risk a contempt citation," then the "*target of the subpoena*" could appeal the denial of the motion to quash. *Id.* at 236-37 (emphasis original). This important distinction between post-compliance appeals by interested parties and by disinterested third parties is discussed in Point III, *infra*.

sures or use by government officials. In *Casey* v. *FTC*, 578 F.2d 793 (9th Cir. 1978), for example, the court held that despite full compliance with an FTC subpoena *duces tecum*, "[t]he possibility that we may yet afford the Union relief by *preventing further disclosure* or by requiring the FTC *to return records* wrongfully subpoenaed vests the appeal with controversy sufficient to render the case justiciable." *Id.* at 796 (emphasis added). Similarly, in *FTC* v. *Gibson Products of San Antonio, Inc.*, 569 F.2d 900 (5th Cir. 1978), the court held that an appeal of an order enforcing an FTC subpoena *duces tecum* was not moot despite compliance: "[i]f this case were decided in Gibson's favor, relief would be available by an order requiring the FTC *to return the subpoenaed documents* and *to forbid use* of the material in the adjudicatory hearing." *Id.* at 903 (emphasis added); *see also FTC* v. *Ernstthal*, 607 F.2d 488, 489 (D.C. Cir. 1979) (post-compliance appeal of order enforcing FTC subpoenas held not moot: "were appellants to succeed in quashing the FTC's subpoena . . . they would be entitled to the immediate return of the documents); *FTC* v. *Browning*, 435 F.2d 96, 97-98 n.1 (D.C. Cir. 1970) (same).

In *Atlantic Richfield Co.* v. *FTC*, 546 F.2d 646 (5th Cir. 1977), the court held that although Atlantic Richfield had complied with an order enforcing an FTC subpoena *duces tecum*, the compliance "has not entirely mooted this appeal, because Atlantic may still be afforded *some relief* by an order to require *return of the subpoenaed documents*. . . ." *Id.* at 650 (emphasis added).[9/] Of particular interest here, the court

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9/ As an alternative ground for its finding that the appeal was not moot, the court found that the compliance had not been certified as complete and the court could order the documents segregated from other FTC staff. 546 F.2d at 650. Nevertheless, the court explicitly held that the ability to order the

explicitly construed the subpoena enforcement provisions of the FTC Act, *see* 15 U.S.C. § 49, *in pari materia* with the summons enforcement provisions of the IRS Code. 546 F.2d at 649-50 & n.4; *see also Anheuser-Busch, Inc.* v. *FTC*, 359 F.2d 487, 489-90 (8th Cir. 1966) (Blackmun, J.). Thus, the court in *Atlantic Richfield* applied *Reisman* v. *Caplin*, 375 U.S. 440 (1964) -- which held that, because 26 U.S.C. § 7402 provides a party an adequate remedy at law to contest an IRS summons in an enforcement proceeding, a party could not institute a separate action to enjoin enforcement of an IRS summons -- to deny relief in an action brought to enjoin an FTC subpoena *duces tecum*. 546 F.2d at 648-50. Particularly given that IRS summons enforcement and FTC subpoena enforcement provisions are to be interpreted *in pari materia*, there is, the Church submits, no principled basis upon which to distinguish compliance with an order enforcing an FTC subpoena *duces tecum* from compliance with an order enforcing an IRS summons for purposes of a determination of mootness.

In addition to summons or subpoena enforcement proceedings, it has long been basic doctrine that courts have the power to order such equitable relief. *See, e.g., Linn* v. *Chivatero*, 714 F.2d 1278, 1283 (5th Cir. 1983) (finding jurisdiction to decide taxpayer's Fourth Amendment claims resulting from inadvertent disclosure of personal records in response to an IRS summons: "in the absence of a pending criminal proceeding, the possiblity of eventual suppression affords little solace"); *Mr. Lucky Messenger Service, Inc.* v. *United States*, 587 F.2d 15, 16-17 (7th Cir. 1978) (finding jurisdiction to order the return of property seized by the government despite the absence of any

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documents returned was a sufficient ground to prevent the appeal from being moot. *Id.*

criminal proceeding because "[c]ourts . . . have additionaily recognized an independent cause of action for return of property based on the general equitable jurisdiction of the federal courts"); *cf. Morrow* v. *District of Columbia*, 417 F.2d 737-39 (D.C. Cir. 1969) (upholding an order issued by the Court of General Sessions, which prohibited dissemination of an arrest record after dismissal of criminal charges, on the basis of ancillary jurisdiction, which *all* courts possess in aid of their original jurisdiction, absent explicit statutory denial of such power).

III. DISINTERESTED THIRD PARTY COMPLIANCE WITH AN IRS SUMMONS ENFORCEMENT ORDER DOES NOT RENDER AN APPEAL MOOT

With the exception of *Gluck*, 771 F.2d at 754 n.3, the cases cited in Point II do not discuss a possible distinction between compliance by interested or disinterested parties for purposes of mootness analysis. The FTC cases in particular correctly recognize that a party does not necessarily surrender a legal interest in the outcome of proceedings in which effective relief may be granted merely because he obeys a lawful court order rather than face potentially serious punishment for contempt. Petitioner contends, however, that the instant matter, which involves disinterested party compliance,[10/] presents a particularly strong case for a finding that the Church's appeal is not moot. Thus, even if this Court were to con-

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10/ The IRS summons in this case was directed against an indisputably disinterested third party -- the Los Angeles County Clerk. The County Clerk's disinterest in this proceeding is demonstrated by his failure to appear or to challenge the summons in any of the proceedings over the last seven years in this Court, in the court below, or on remand to the district court.

clude that when the taxpayer himself complies with a summons enforcement order rather than risking contempt, he has effectively forfeited his interest in the outcome, the same obviously cannot be said of a taxpayer's appeal following compliance by a disinterested party. Finally, petitioner emphasizes that it is not arguing for an *exception* to mootness principles when compliance is by a disinterested party, but rather that such a case is *not* moot when traditional mootness principles are applied properly.

Although most courts have simply ignored the issues raised by disinterested third party compliance, *see* Point IV, *infra*, the few courts that have addressed the issue have recognized a distinction between interested and disinterested party compliance for purposes of mootness analysis. In *Gluck*, *supra*, the Third Circuit noted that its position that a post-compliance appeal is not moot "perpetuates the conflict between this court and most other courts of appeals. . . ." 771 F.2d at 754 n.3. The court recognized, however:

> It appears that some of these courts would nevertheless hold that this case is not moot given that compliance with the summons was carried out by someone other than the appellant, i.e., the bank. These courts distinguish between cases in which the summons is issued to the taxpayer/appellant and those in which it is issued to a third party where the taxpayer has intervened. They reason that it is unreasonable to expect *a disinterested third party* to resist a summons and risk contempt of court in order to keep a controversy live; thus they hold that *compliance by the third party does not moot the appeal*.

Id. (emphasis added) (citing *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980); *United States* v. *Kis*, 658 F.2d 526 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982)).

In *Arthur Andersen*, for example, the summoned third party, a large accounting firm, had a strong financial incentive to resist the summons.[11/] The First Circuit held that in such circumstances, the *interested* third party must refuse disclosure and risk a contempt citation to preserve for appeal the issue of the validity of the underlying enforcement order. 623 F.2d at 724. Because Arthur Andersen had complied with the summons, the court held that the appeal was moot. The court, however, explicitly distinguished this situation from that of a *disinterested* third party: "It would be unreasonable to expect individuals with no strong interest in resisting the subpoenas to expose themselves to contempt by refusing to comply" in order to preserve the issues for appeal. *Id.* at 723-24.

Similarly, in *Kis*, the court held that *taxpayer* compliance with an IRS summons moots the taxpayer's appeal. 658 F.2d at 534. The court, however, explicitly distinguished that case from *In re Special April 1977 Grand Jury*, 581 F.2d 589 (7th Cir.), *cert. denied*, 439 U.S. 1046 (1978), in which an appeal of a denial of a motion to quash grand jury subpoenas *duces tecum* was held not moot because compliance had been by *disinterested* parties. *Kis*, 658 F.2d at 534. In distin-

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11/ The First Circuit stated that, "although Andersen is not the immediate target of the IRS investigation, it has asserted strenuously that it is damaged by the disclosure of these work papers to the IRS. . . . This asserted interest provides sufficient incentive for Andersen to take all available steps to avoid disclosure," including being held in contempt. *Arthur Andersen*, 623 F.2d at 724.

guishing its prior decision, the court stated "the subpoenas were directed at members of the staff of appellant . . ., not to [appellant] himself. It would have been unreasonable to require those staff members, who had *no personal interest in resisting* the subpoenas, to expose themselves to contempt by refusing to comply." *Id.* (emphasis added).[12/]

In *United States* v. *Kersting*, 891 F.2d 1407 (9th Cir. 1989), *cert. denied*, ___U.S.___, 111 S.Ct. 49 (1990), the IRS issued a summons to Kersting, who promoted tax shelters, in order to identify taxpayers participating in his investments. *Id.* at 1408-09. The taxpayers intervened in the proceedings. *Id.* at 1410. Kersting "zealous[ly]" contested the summons, *id.* at 1411 n.9, and was held in contempt for refusing to comply with the district court's enforcement order, *id.* at 1409-10. On appeal, the Ninth Ciruit was unable to determine if Kersting had ultimately complied with the summons enforcement order, but, in dictum, stated that "[i]f he has so complied, *his appeal* of that order is moot." *Id.* at 1410 (emphasis added).

12/ In *United States* v. *Porter*, 711 F.2d 1397 (7th Cir. 1983), the court rejected the taxpayer's claim that he should be permitted to pursue an appeal following his attorney's compliance with a summons enforcement order on the ground that the attorney could not be expected to risk contempt in order to obtain review of the district court's order. *Id.* at 1400. The court interpreted the taxpayer's claim as seeking "a special exception to the mootness doctrine," *id.*, pursuant to *Perlman* v. *United States*, 247 U.S. 7, 12-13 (1918), rather than a claim that the appeal was not moot because the taxpayer continued to be engaged in a live controversy with the government. The court also mistakenly viewed the matter as merely "a disclosure controversy," which ended with "the surrender of the documents sought," *id.*, rather than as an ongoing controversy over the government's present possession and use of the documents. *See Gluck*, 771 F.2d at 753-54.

The court also found that compliance by Kersting would moot the intervening taxpayers' appeal because Kersting was an *interested* third party with a clear and strong economic motive to resist the summons. *Id.* at 1411 & n.9 (citing *Arthur Andersen*, *supra*). As the Ninth Circuit noted, *Arthur Andersen* "holds that whereas it is unreasonable to expect a *disinterested* third party to resist a summons at the risk of being held in contempt in order to protect the interests of those taxpayers whom the records concern, no such conclusion applies to interested third parties." *Kersting*, 891 F.2d at 1411 n.9 (emphasis original). Inexplicably, in dismissing the instant appeal as moot, the court below cited to *Kersting* without any discussion or analysis of *Kersting*'s explicit recognition that *disinterested* party compliance should not render an interested intervenor's appeal moot (Pet. App. 2a).

In *Baldridge* v. *United States*, 406 F.2d 526 (5th Cir. 1969), the majority relied upon two prior Fifth Circuit decisions involving taxpayer compliance to find an appeal moot after disinterested third party compliance with a summons enforcement order. Chief Judge Bailey Aldrich of the First Circuit, sitting by designation, however, wrote separately:

> If I had to cast the deciding vote I might find it somewhat difficult to accept that if the government seeks court relief to take from A certain property which A asserts is the property of B. . . . review of the court's order is mooted and all rights of appeal are lost if A, denied a stay pending appeal, chooses to surrender the property as against electing to spend up to a year in jail. A bailee has an obligation to protect property, but not to that extent.

Id. at 527 (Aldrich, C.J., dubitante).

Here, of course, the Church has had absolutely no control over the County Clerk's copies of its tapes or his decision to comply with the summons rather than risk contempt. As *Kersting*, *Arthur Andersen*, *Kis*, and *Gluck* have recognized, it is patently unfair and unreasonable to hold that an otherwise live and concrete controversy between the parties is mooted by the actions of a disinterested party with no stake in the outcome. These concerns of reasonableness and fairness have special force here where the documents at issue were wrongfully obtained by Mr. Armstrong in the first instance.[13/] Because the Church, after extensive, but ultimately unsuccessful, efforts to obtain a stay in the district court, the court of appeals, and this Court (and after its motion to expedite the appeal was granted), was unable to prevent the County Clerk's compliance with the summons enforcement order prior to appellate review, the Church's appeal should not have been dismissed as moot. There is no logic to a rule of mootness and, hence, a taxpayer's right of appeal, that turns on the fortuity of the location of the summoned material.

Petitioner emphasizes, however, that it does not seek an exception to the Article III case or controversy requirement based on some equitable notion of

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13/ Unlike most third party cases, in which the summons is directed at banks, attorneys, or accountants to whom the taxpayer voluntarily provided documents and financial information that the IRS subsequently sought, neither the Church nor Mr. Hubbard placed the tapes in the summoned party's possession. The tapes would not have been in the Clerk's possession but for their improper conversion by Mr. Armstrong.

reasonableness and fairness.[14/] Rather, the distinction recognized in the cases between interested and disinterested third party compliance is consistent with fundamental principles of mootness doctrine. Thus, even if this Court were to conclude that when an interested party complies with an order enforcing a subpoena or a summons, he may thereby demonstrate a lack of "a concrete interest in the outcome of the litigation," *Stotts*, *supra*, 467 U.S. at 571; *see, e.g.*, *Kis*, 658 F.2d at 534, a court has no basis to conclude that an interested party no longer has a concrete adverse interest in the litigation's outcome merely because of compliance by a disinterested party, *cf. Sibron* v. *New York*, 392 U.S. 40, 57 (1968) (holding appeal not moot where there has been no "suggestion that either Sibron or the State has been wanting in diligence or fervor in the litigation").

The summons enforcement cases discussed, *supra*, are consistent with this Court's decisions, which have long interpreted jurisdictional requirements with an eye to preserving the rights of interested parties when the government seeks documents from disinterested third parties. In *Perlman* v. *United States*, 247 U.S. 7 (1918), for example, the Court held that the jurisdictional finality rule for appeals did not bar the interested party -- who otherwise would be "powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way," *id.* at 13 -- from immediately appealing an order directing a court clerk to release to the govern-

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14/ *But see Honig* v. *Doe*, 484 U.S. 305, 329-32 (1988) (Rehnquist, C.J., concurring) (questioning prevailing view that mootness doctrine is rooted in Article III case or controversy requirement, and arguing that this Court has power to create exceptions to mootness doctrine "where there are strong reasons to" do so).

ment certain documents held under seal. *Id.* at 10-11.[15/] "The Court [in *Perlman*] held an order compelling production was appealable because it was unlikely that the third party would risk a contempt citation in order to allow immediate review of the appellant's claim of privilege." *United States* v. *Nixon*, 418 U.S. 683, 691 (1974); *see United States* v. *Ryan*, 402 U.S. 530, 533 (1971); *see also In re Grand Jury Subpoena*, 926 F.2d 1423, 1430 n.4 (5th Cir. 1991); *Doe*, *supra*, 825 F.2d at 236-37 (had Doe been a "third-party attorney who cannot be expected to risk a contempt citation," then the "target of the subpoena" could appeal the denial of the motion to quash); *Kis*, *supra*, 658 F.2d at 534; *In re Grand Jury Proceedings in Matter of Fine*, 641 F.2d 199, 201-02 (5th Cir. 1981) (citing cases). As these cases demonstrate, this Court has not construed jurisdictional requirements inflexibly to deny interested parties an appellate forum to review enforcement orders directed at disinterested parties. The same considerations should be applied here to permit the Church to pursue its appeal of the district court's erroneous enforcement order.

Finally, in 1976, Congress expressly provided a taxpayer with the right to notice and to intervene to prevent disinterested third party compliance with an IRS summons prior to judicial resolution. *See* 26 U.S.C. § 7609(a), (b)(1). This amendment modified *Donaldson* v. *United States*, 400 U.S. 517 (1971), in which this Court held that a taxpayer had only a permissive right of intervention in a summons enforcement proceeding directed against a third party. *Id.* at 528-30. Section 7609 reflected congressional concern that "the use of [third party summonses] should not

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15/ It appears from the Court's opinion that the government may have obtained the documents prior to the Court's review of the merits of the appeal. *Perlman*, 247 U.S. at 11.

unreasonably infringe on the civil rights of taxpayers, including the right to privacy. . . [current IRS policies] do not fully provide all of the safeguards which might be desirable in terms of protecting the right to privacy." H.R. Rep. No. 94-658, 94th Cong. 2d Sess. 307, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2897, 3203. "While the third-party witness also has this right of challenge . . . the interest of the third party witness in protecting the privacy of the records in question is frequently far less intense than that of the person to whom the records pertain." *Id*; *see* S. Rep. No. 94-938, 94th Cong., 2d Sess. 368, *reprinted in* 1976 U.S. Code Cong. & Ad. News 3439, 3797; *United States* v. *New York Tel. Co.*, 644 F.2d 953, 956 (2d Cir. 1981).

Nothing in section 7609 evinces a congressional intent to limit judicial review of the propriety of the summons solely to the district court, whether that court's order is erroneous or not. *See* 26 U.S.C. § 7609(h)(l); *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964). The consistent practice of the district courts, the courts of appeals, and this Court, however, has been to deny a stay following an order enforcing a summons directed at a disinterested third party, as occurred here. The effect of such denials, when coupled with holding the taxpayer's appeal moot following disinterested party compliance, not only is to deny consideration of a potentially meritorious appeal, but to undermine the rationale of *Perlman* and render the procedural protections created by Congress in 26 U.S.C. § 7609 a nullity for any taxpayer who does not prevail initially in the district court, no matter how erroneous the district court's order.

The Church further emphasizes that permitting its appeal to go forward will not interfere with the IRS' tax collection functions. The IRS has had the tapes for almost one year (and the transcript for over seven years) and may use them to pursue its alleged

civil fraud investigation unless and until a court orders otherwise. If an appellate court finds the district court order erroneous, certainly there is no injustice in requiring that the IRS return the tapes and make no further use of them. By contrast, both taxpayer intervention, authorized by Congress in 26 U.S.C. § 7609(b), and the ability of a taxpayer to preserve his right to appeal by refusing to comply with an enforcement order directed at him and risking contempt, may substantially delay IRS access to summoned documents and have a far greater impact on the IRS' pursuit of tax revenues than consideration of an interested party's appeal following disinterested party compliance with an erroneous summons enforcement order.

IV. PREVIOUS DECISIONS OF THE COURTS OF APPEALS FAIL TO ESTABLISH THAT COMPLIANCE BY A DISINTERESTED THIRD PARTY MOOTS AN APPEAL

The government has essentially ignored the availability of effective relief through return of the tapes and no further use of them, and instead has primarily relied upon its contention that all courts of appeals to consider the issue, except the Third Circuit, have held that compliance with an order enforcing an IRS summons renders an appeal moot. Although the government is correct that many cases hold that compliance moots an appeal of a summons enforcement order, these decisions consistently lack any meaningful analysis of the relevant issues that would in fact determine whether an appeal is moot, particularly whether the courts could grant effectual relief to the taxpayer by ordering return of or prohibiting further use of the documents. Moreover, as discussed in Point III, *supra*, those few courts that have actually considered the issue of disinterested party compliance have indicated that such compliance should not render an appeal by the interested party moot.

Petitioner is aware of 28 reported cases in nine courts of appeals[16/] -- ten were decided by the Fifth Circuit, five by the Eighth Circuit -- that have held post-compliance appeals of IRS summons enforcement orders moot. Ten of these appeals have involved compliance by the taxpayer or other clearly interested party. Eighteen of these appeals have involved compliance by a clearly or possibly disinterested third party.[17/] Most of these cases contain little or no analysis and merely cite to earlier cases, often from other circuits, that themselves contain little or no analysis. The supposed overwhelming weight of authority upon which the government relies is, upon analysis, nothing more than a house of cards built upon an extremely shaky foundation.

The fundamental flaw of those few decisions that actually contain any analysis is that they focus on a past event -- disclosure of the documents -- or a future event -- admission of the documents in a speculative future proceeding brought by the government -- (or both) and ignore a crucial issue for the taxpayer -- *present retention or use* of the summoned records by the IRS for investigative purposes, for which, as the Third Circuit recognized, effective relief may be granted. *See Gluck*, *supra*; *Waltman*, *supra*.

Thus, some courts have stated that once the documents have been disclosed, the court can do

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16/ Apparently, the District of Columbia and Eleventh Circuits have not issued any reported decisions on this question.

17/ Because, like the decision below (1a-2a), several of the cases contain virtually no factual description or legal analysis, it is sometimes impossible to tell whether the complying third party is interested or disinterested in the outcome. *See, e.g., United States v. Silva & Silva Accountancy Corp.*, 641 F.2d 710 (9th Cir. 1981) (citing two cases, one which involved a disinterested party and one which involved an interested party).

nothing further. *See, e.g., United States* v. *Barrett*, 837 F.2d 1341, 1346 (5th Cir. 1988) ("a successful challenge to the enforcement order could afford no relief; the information has already been provided and thus the court would be powerless to provide relief that would affect the rights of the litigants"), *cert. denied*, 492 U.S. 926 (1989); *Hintze* v. *IRS*, 879 F.2d 121, 125 (4th Cir. 1989); *Porter*, *supra*, 711 F.2d at 1400. Other courts assert that because the taxpayer may bring a motion to suppress should the IRS seek to admit the records in some hypothetical future proceeding that may not occur, any decision on the propriety of the district court's enforcement order would be "an advisory opinion." *Lawhon* v. *United States*, 390 F.2d 663 (5th Cir. 1968); *see, e.g., United States* v. *Trails End Motel, Inc.*, 657 F.2d 1169, 1170 (10th Cir. 1981); *United States* v. *Lyons*, 442 F.2d 1144, 1145 (1st Cir. 1971). These courts simply fail to address the issue that is the taxpayer's obvious concern in pursuing his appeal following compliance -- immediate "prohibition of the use of the summoned documents . . . to afford [the taxpayer] effective relief." *Gluck*, 771 F.2d at 754. Because the cases generally fail to address this critical issue they provide no support for the government's position.

The seminal, and frequently cited, case on the issue of mootness following compliance with a summons enforcement order is the Fifth Circuit's decision in *Lawhon*, *supra*, in which the summons was issued to the taxpayer. The taxpayer not only produced the records, but they *"have subsequently been returned . . . ."* *Id.* at 663 (emphasis added). The court dismissed the appeal as moot, stating, without citation or further analysis:

> This motion, in effect, seeks to have this court give an advisory opinion as to the admissibility in evidence of the records or

> their product in the event of a subsequent criminal trial. Such event may not occur. This court passes no judgment on the question whether, if the mooted records are used in a subsequent prosecution of the taxpayers, if there be one, their introduction would be forbidden as violating the constitutional rights of the defendants.

Id. The court did not address present IRS use of the records, and had no need to do so because they had been returned. None of the numerous cases that cite to *Lawhon* make any reference to that fact.

In *Grathwohl* v. *United States*, 401 F.2d 166 (5th Cir. 1968), the court, without further analysis, relied on *Lawhon* to hold an appeal moot following compliance by a corporate officer with a summons enforcement order directed against the corporation. In *Baldridge*, *supra*, the majority, again without further analysis, relied upon *Lawhon* and *Grathwohl* to find an appeal moot after *disinterested* third party compliance with a summons enforcement order. As discussed in Point III, *supra*, one judge, however, wrote separately to express his doubts about holding a taxpayer's appeal moot because a disinterested party chose to comply with a court order rather than be held in contempt. 406 F.2d at 527 (Aldrich, C.J., dubitante).

Several other Fifth Circuit decisions, which held post-compliance appeals moot following disinterested party compliance, have cited to these or subsequent Fifth Circuit decisions, with no further analysis and no discussion of the doubts raised by Judge Aldrich in *Baldridge*. *See United States* v. *Carpenter*, 425 F.2d 264 (5th Cir. 1970); *United States* v. *Hankins*, 565 F.2d 1344 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); *United States* v. *First Bank of Clute*, 626 F.2d 1227 (5th Cir. 1980), *cert. denied*, 452 U.S. 908 (1981);

United States v. *First American Bank*, 649 F.2d 288 (5th Cir. 1981); *United States* v. *Sweet*, 655 F.2d 54 (5th Cir. 1981).

In *United States* v. *Sherlock*, 756 F.2d 1145 (5th Cir. 1985), involving taxpayer compliance, the court reiterated *Lawhon's* rationale that the taxpayer may challenge an attempt to admit the records in a hypothetical future proceeding brought by the IRS. *Id.* at 1146-47. Of particular interest here, the opinion noted the Fifth Circuit's prior decision in *FTC* v. *Gibson Products*, *supra*, 569 F.2d 900, which had held that "compliance with summons did not moot appeal when further relief was available from appellate court through order to return subpoenaed documents and to forbid use of documents in ongoing adjudication." *Sherlock*, 756 F.2d at 1147 n.1. Nevertheless, in *Sherlock*, the court made no attempt to explain why the relief available to Gibson through return of documents and prohibition of use of the documents was not available to the taxpayer, nor did it otherwise attempt to reconcile its decision with *Gibson Products*.[18/]

In *Barrett*, *supra*, also involving taxpayer compliance, the Fifth Circuit, sitting *en banc*, reviewed the previous decisions of that court, 837 F.2d at 1345-46, and concluded, "Although none of the above authority provide much analysis, apparently the common denominator is that once *an individual* complies with a summons enforcement order, *that person* is precluded from appealing any issues that attack the validity of the . . . decision to enforce the summons." *Id.* at 1346 (emphasis added). Although *Barrett* noted that

18/ In *Gibson Products*, the court claimed to distinguish *Baldridge* on the unexplained ground that "it was not clear in *Baldridge* that further relief was available." 569 F.2d at 903 n.5.

"Sherlock's argument that the government continued to benefit from the material did not persuade the court otherwise[,] 756 F.2d at 1146," *Barrett*, 837 F.2d at 1345, neither *Barrett* nor *Sherlock* otherwise addressed this issue.

In *Lyons*, *supra*, 442 F.2d 1144, after a summons was issued to a third party accountant, the taxpayer obtained the summoned documents from the accountant. The district court then enforced the summons and the taxpayer returned the documents to the accountant, who complied with the summons. *Id.* at 1145. The First Circuit held the appeal moot on the ground that the taxpayer could seek to prevent use of the documents "[i]f and when a future criminal proceeding is initiated against taxpayer." *Id.* The court also stated that "appellate consideration of the propriety of the summons" was not justified at "this purely investigative stage," *id.*, but it made no attempt to explain why the district court has the authority to quash a summons at the investigatory stage, *see* 26 U.S.C. §§ 7402, 7604, yet it would be improper for an appellate court to exercise such power.

Numerous cases in six other circuits involving disinterested parties have flowed directly from the unexamined conclusions of *Lyons* and the early Fifth Circuit cases such as *Lawhon*, with no independent analysis and no discussion of any distinctions between taxpayer and disinterested party compliance.[19/] *See*, *e.g.*, *United States* v. *Deak-Perera International Banking Corp.*, 610 F.2d 89 (2d Cir. 1979); *Kurshan* v. *Riley*, 484 F.2d 952 (4th Cir. 1973); *Hintze* v. IRS, 879 F.2d 121, 124-25 (4th Cir. 1989); *United States* v. *Patmon*,

19/ The four summons enforcement cases that hold a post-compliance appeal moot, but which do consider the distinction between disinterested and interested party compliance, are discussed in Point III, *supra*.

630 F.2d 458, 459 (6th Cir. 1980); *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1277 (7th Cir. 1984); *Barney* v. *United States*, 568 F.2d 116, 117 (8th Cir. 1978); *United States* v. *First National Bank of Sturgis*, 587 F.2d 909, 910 (8th Cir. 1978); *United States* v. *Olson*, 604 F.2d 29, 31 (8th Cir. 1979); *United States* v. *Equity Farmers Elevator*, 652 F.2d 752 (8th Cir. 1981); *United States* v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710 (9th Cir. 1981).

The Tenth Circuit has decided two cases involving interested party compliance, one which involved virtually no analysis. *See Trails End Motel, Inc., supra*, 657 F.2d at 1170-71. In *United States* v. *Church of World Peace*, 878 F.2d 1281 (10th Cir. 1989), the court, after a lengthy string cite, rejected the taxpayers' assertion that their claim for return of all copies of the documents and their expungement from IRS files prevented the case from being moot, although the *only* case the court cited that discussed this issue was *Gluck*, *supra*, which the court acknowledged had explicitly held to the contrary. *Id.* at 1284.

Finally, *United States* v. *Orlowski*, 808 F.2d 1283 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987), is of particular interest. The court therein stated, "This circuit, as well as every other circuit that has considered the question, has determined that compliance with an IRS summons moots a taxpayer's appeal of summons enforcement orders." *Id.* at 1287. The court then distinguished *Gluck* on the purported ground that "another issue was involved in the case, namely, whether the IRS could use the information it obtained under the summonses." *Id.* at 1287 n.6. The court in *Gluck*, however, correctly focused on the issue not just in *that* case, but in virtually *every* post-compliance taxpayer appeal. If the taxpayer has no objection to the IRS' *use* of the summoned information, then why would he pursue an appeal rather than await an

attempt by the IRS to admit the evidence in some future prosecution?

Although a minority view, *Gluck* is clearly correct that a controversy remains between the *interested* party and the IRS concerning "use of the summoned documents," 771 F.2d at 754, and effective relief remains available after the IRS obtains the summoned documents from a disinterested party and before it seeks to admit them against the taxpayer in a future proceeding. *Id.* The unspoken -- and incorrect -- assumption of the cases that hold a post-compliance appeal moot is that if the IRS ultimately does not commence criminal or civil tax proceedings, then no harm to the taxpayer is done. A necessary corollary to this assumption is that the taxpayer has no interest in prohibiting continued government possession of his private, proprietary records, and that he suffers no harm when the IRS has improper or unlawful access to these papers; when it discloses them to other officials; when it uses those papers to conduct a potentially intrusive and embarrassing investigation of a taxpayer; and when it brings a criminal or civil tax proceeding dependent on improperly obtained documents.

In *Sells*, this Court rejected similar arguments, and made clear that the government's continuing access to, use, and disclosure of wrongfully obtained documents was itself a serious ongoing harm that constituted a live controversy over which the federal courts retained jurisdiction to fashion an appropriate remedy. 463 U.S. at 422 n.6. As the court of appeals stated in *Sells*, "This action is a proper means to prevent future disclosure before it occurs; the availability of a motion to suppress in future civil proceedings" does not foreclose the court's immediate consideration of the issues. 642 F.2d at 1188; *see also Gluck*, 771 F.2d at 753-54; *Doe*, *supra*, 825 F.2d at 235.

Congress also has rejected the view that a taxpayer suffers no harm when the IRS obtains documents from an interested third party. By enacting section 7609 to permit a taxpayer to challenge an IRS summons issued to a disinterested party, Congress recognized that the taxpayer may suffer substantial harm when the IRS improperly or unlawfully obtains and uses the citizen's private papers. *See* H.R. Rep. No. 94-658, *supra*, at 307 ("use of [third party summons] should not unreasonably infringe on the civil rights of taxpayers, including the right to privacy"); S. Rep. No. 94-938, *supra*, at 368.

Petitioner retains a privacy interest in the tapes sufficient to warrant their return and an order prohibiting the IRS from further use or dissemination, should the district court's enforcement order be found erroneous. *See, e.g., United States* v. *Hubbard*, 650 F.2d 293 (D.C. Cir. 1980). In *Hubbard*, the court found ancillary jurisdiction to hear the Church's motion to reseal records based on a combination of privacy and property interests. As the court noted, "Congress has recognized that the dissemination of information compounds whatever infringement of privacy occurs when materials or information are obtained through compulsory means". *Id.* at 305. The court also held that the Church's privacy interest in its documents survived an eight-month period during which the documents were available for public inspection pursuant to an improper district court unsealing order: "Because we conceive of the interests asserted as a continuum which can be further invaded with each passing day by a single and unchanging encroachment, we do not think the case has become moot." *Id.* at 319 n.99; *see also Cell Associates, Inc.* v. *National Institutes of Health*, 579 F.2d 1155, 1157 (9th Cir. 1978).

Petitioner also has a proprietary right in the copies of the tapes that has not been diminished or extinguished by the IRS' possession. *See, e.g., Sovereign News Co.* v. *United States*, 690 F.2d 569, 577 (6th Cir. 1982) (holding that *copies* of Sovereign News' business records in the government's possession were the "sole property" of Sovereign News; "when the government has held the copies for a 'reasonable time' and has no investigations in progress, it must return the copies as well as the originals"), *cert. denied*, 464 U.S. 814 (1983).

Indeed, under the government's "logic", there would never be a reason to permit a taxpayer challenge to a third-party summons. The IRS would issue the summons and the disinterested party would be required to produce the documents. Any challenge would have to await some future proceeding in which the IRS sought to admit the documents against the taxpayer. Certainly, a district court order -- whether or not erroneous -- enforcing a summons issued to a disinterested party is no more "advisory" or "speculative" on the admissibility of those records in some future proceeding than an appellate court ruling on this issue. The possible availability of a future proceeding in which the taxpayer may make a suppression motion, however, is simply irrelevant to the present mootness inquiry, which concerns the IRS' *present* right to use and to possess the documents.

Thus, the courts that have rejected the Third Circuit's reasoning are simply incorrect that resolution of the substantive questions raised by the Church on appeal would constitute "'an advisory opinion as to the admissibility in evidence of the records or their product in the event of a subsequent criminal trial.'" *Barrett*, 837 F.2d at 1346 (quoting *Lawhon*, 390 F.2d at 663). Rather, the appellate court would be resolving a definite and concrete live controversy between

adverse parties, which, if resolved in favor of the Church, could be remedied through return of the tapes and a prohibition on any future disclosures or use of the information obtained. *See Sells*, 463 U.S. at 422 n.6; *Gluck*, 771 F.2d at 753-54. Congress, in enacting 26 U.S.C. § 7609, intended to provide taxpayers with the ability to prevent erroneous IRS access to documents held by disinterested third parties. It belies logic and common sense to conclude that Congress' concerns dissipate at the moment of disinterested party compliance with an *erroneous* district court order, so as to deprive the taxpayer of his right to appeal and to obtain effective relief.

CONCLUSION

For the reasons stated herein, the judgment of the court of appeals should be reversed, and the matter should be remanded for resolution of the issues raised by the Church in its appeal.

Dated: New York, New York
May 1, 1992

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA and FRANK S. ZOLIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an appeal from an order enforcing an administrative summons becomes moot when the materials sought by the summons have been produced pursuant to the order.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-946

CHURCH OF SCIENTOLOGY OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA and FRANK S. ZOLIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) dismissing the appeal as moot is unreported.[1] The orders entered by the district court (Pet. App. 3a-11a) on March 13, April 15, May 21, 1991, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1991. The petition for a writ of certiorari was filed on December 9, 1991 and granted on March 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The prior opinion of the court of appeals (Pet. App. 13a-15a) following remand from this Court in *United States* v. *Zolin*, 491 U.S. 554 (1989), is reported at 905 F.2d 1344, cert. denied, 111 S. Ct. 1309 (1991).

STATEMENT

1. In 1984, the Internal Revenue Service (IRS) commenced an investigation of the tax returns of L. Ron Hubbard, founder of petitioner (the Church of Scientology), and others, for tax years 1979-1983. In July 1984, Los Angeles newspapers reported that former Church of Scientology officials had testified in a state court action in California (*Church of Scientology* v. *Gerald Armstrong*, No. C 420 153 (Cal. Super. Ct. Aug. 10, 1984)) that millions of dollars had been transferred from various Scientology entities to Hubbard in the late 1970's and early 1980's. As part of its investigation, the IRS served an administrative summons on the Clerk of the Los Angeles County Superior Court seeking certain documents contained in the record of the state court case.[2] The Clerk's Office, however, refused to produce 13 documents that had been ordered sealed by the Superior Court. Pet. App. 29a. The IRS then brought this proceeding in federal district court to enforce its administrative summons. See *United States* v. *Zolin*, 491 U.S. 554, 557-558 (1989).

Petitioner and Mary Sue Hubbard intervened to oppose production of the sealed documents. Petitioner claimed that sealed Exhibit 5-C—which contains tape recordings of two meetings between various attorneys and representatives of petitioner and L. Ron Hubbard (the MCCS tapes)—was protected by the attorney-

[2] The Internal Revenue Service is authorized to issue summonses to obtain production of "any books, papers, records, or other data" that "may be relevant" in "determining the liability of any person for any internal revenue tax" (26 U.S.C. 7602(a)(1)). The district courts have jurisdiction to enforce compliance with these administrative summonses. 26 U.S.C. 7402(b), 7604(a).

client privilege. The government contended, however, that the MCCS tapes fell within the crime-fraud exception to the privilege. See 491 U.S. at 558; Pet. App. 37a.[3] The district court ruled that the MCCS tapes contained confidential attorney-client communications, that the privilege had not been waived and that the crime-fraud exception to the attorney-client privilege did not apply. See 491 U.S. at 559.[4]

[3] Affidavits submitted by the government alleged that the taped meetings "focused generally on the intentional violation of the tax laws" and specifically discussed "i) a proposed scheme whereby the Church's cash transfers to Hubbard would be disguised as payments for services rendered (allegedly to insulate Hubbard from tax liability and to protect the Church's tax-exempt status), and ii) a proposed scheme whereby Hubbard would be able to control royalty income * * * without that control being traceable to him." *United States* v. *Zolin*, 809 F.2d 1411, 1418-1419 (9th Cir. 1987); Pet. App. 40a-41a.

The government also submitted partial transcripts of the MCCS tapes. The special agent assigned to the investigation stated in his declaration that these partial transcripts had been obtained by the IRS prior to issuance of the summons from a confidential source who was not a party to the litigation in the Superior Court. See *United States* v. *Zolin*, 491 U.S. at 559 n.5. In its prior opinion in this case, this Court assumed, without deciding, that the transcripts were legally obtained. *Id.* at 558-559 & n.5.

[4] At petitioner's request, the district court directed the IRS not to deliver the summoned information to other government agencies except under certain, limited circumstances (Pet. App. 4a, 46a). The court of appeals upheld that restriction (*id.* at 35a-36a) and this Court affirmed its judgment on that issue by an equally divided vote (*United States* v. *Zolin*, 491 U.S. at 561). That aspect of the district court's order is not now before this Court. We note, however, that other courts have concluded that such restrictions on the use of documents produced pursuant to summons are not valid. See *United States* v. *Barrett*, 837 F.2d 1341, 1349-

2. The court of appeals affirmed. *United States* v. *Zolin*, 809 F.2d 1411 (9th Cir. 1987).[5] The court held that the crime-fraud exception may be invoked to compel disclosure of otherwise privileged communications only when the movant has first established, with evidence independent of the communications themselves, a *prima facie* case of fraud. *Id.* at 1418-1419; Pet. App. 40a-41a. The court concluded that there was insufficient "independent evidence" to establish that the crime-fraud exception was applicable to the MCCS tapes. *Ibid.*

This Court granted certiorari and, on June 21, 1989, held that the allegedly privileged materials may be reviewed *in camera* to determine whether they fall within the crime-fraud exception. *United States* v. *Zolin*, 491 U.S. at 562-575. Such review is proper when the requesting party has presented relevant, non-privileged evidence supporting "a reasonable belief that *in camera* review may yield evidence that establishes" the applicability of the crime-fraud exception. *Id.* at 574-575.

3. On remand, the court of appeals examined the partial transcripts of the tapes, along with the independent evidence that it had reviewed in its first

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1351 (5th Cir. 1988) (en banc), cert. denied, 492 U.S. 926 (1989).

[5] L. Ron Hubbard died on January 24, 1986, during the pendency of the appeal. The court of appeals rejected petitioner's suggestion that Mr. Hubbard's death made enforcement of the summons moot, because the IRS retained power to investigate the potential civil liability of the estate of Mr. Hubbard (and of other parties) following his death. Pet. App. 30a; 809 F.2d at 1414. See also *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1522 n.1 (9th Cir. 1986). For the same reason, this Court stated that it was "satisfied that a live controversy remains." 491 U.S. at 557 n.3.

opinion, and found "sufficient evidence of intended illegality to establish that the tapes are within the crime-fraud exception" (Pet. App. 14a-15a). *United States* v. *Zolin*, 905 F.2d 1344 (9th Cir. 1990).[6] In so ruling, the court of appeals stated (Pet. App. 15a):

> The partial transcripts demonstrate that the purpose of the MCCS project was to cover up past criminal wrong-doing. The MCCS project involved the discussion and planning of future frauds against the IRS, in violation of 18 U.S.C. § 371 * * * [and the] figures involved in MCCS admit on the tapes that they are attempting to confuse and defraud the U.S. Government. The purpose of the crime-fraud exception is to exclude such transactions from the protection of the attorney-client privilege.

On September 19, 1990, the court of appeals denied petitioner's request for rehearing and suggestion for rehearing en banc. Pet. App. 12a. Petitioner then filed a petition for a writ of certiorari with this Court.

4. Petitioner did not seek a stay of mandate pending disposition of its petition for a writ of certiorari. When the court of appeals issued its mandate, the district court ordered the MCCS tapes to be produced to the government.[7] On petitioner's motion, however,

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[6] The court of appeals ruled that, by not raising it on the first appeal, petitioner had waived the claim that the government had illegally obtained the partial transcripts (Pet. App. 15a n.2). See also Pet. App. 42a-43a; note 3, *supra*.

[7] Petitioner suggests (Pet. Br. 7) that the United States could have contended that the case became moot at this stage of the litigation, when the records were produced temporarily under the district court's order. We do not agree. The temporary possession of documents that occurs before effective inspection and duplication transpires does not con-

the district court thereafter ordered the government to return the tapes to the clerk of the district court until this Court acted on the then-pending certiorari petition from the judgment of the court of appeals (Pet. App. 7a-11a). On March 18, 1991, this Court denied the petition for a writ of certiorari in *Church of Scientology* v. *United States*, 111 S. Ct. 1309. Upon denial of the petition, the decision of the court of appeals holding that the documents were within the crime-fraud exception to the attorney-client privilege—and were therefore properly subject to the summons—became a final, nonappealable judgment.[8]

Petitioner nonetheless renewed its objection to the release of the tapes in the district court on the same grounds previously urged in the court of appeals: that the partial transcripts submitted to the court by the IRS had been obtained illegally; that the tapes were not relevant to any ongoing IRS investigation;

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stitute full compliance with the summons. In any event, the controversy was reinstituted when the Untied States Attorney returned the records to the district court without inspecting or making or keeping a copy of them. Upon return of the documents, the district court ruled that "the previous stay of delivery of the MCCS tapes should remain in effect until the Petition for Certiorari is ruled upon" (Pet. App. 8a).

[8] Having rejected all of petitioner's objections to production, the court of appeals directed the district court on remand to "admit the MCCS tapes into evidence, subject to any objections the parties might make at that time" (Pet. App. 15a). The district court properly construed the court's mandate to require production of the documents pursuant to the IRS summons (*id.* at 9a), since all issues relevant to that determination have now "long since been determined" (*ibid.*) by the Supreme Court and the court of appeals.

and that the MCCS tapes contained no evidence of a crime or fraud (see Pet. App. 7a-11a, 15a & n.2, 30a; 491 U.S. at 557 n.3). In response to petitioner's renewed efforts to relitigate the merits of the question whether the documents should be produced, the district court observed that petitioner "cannot win in this court a case which it lost in the Supreme Court and the Court of Appeals" (Pet. App. 6a). Noting that "[l]itigation must end sometime" (*ibid.*), the district court entered its order requiring the documents to be delivered to the IRS and refused to stay its order pending appeal. The court did, however, grant a brief, temporary stay to allow petitioner an opportunity to seek a stay pending appeal from the court of appeals (*ibid.*).

5. On May 6, 1991, the court of appeals denied petitioner's motion for a stay. Petitioner's application to this Court for a stay was denied by Justice O'Connor on May 8, 1991. The MCCS tapes were then released to the United States Attorney for copying, and those copies were delivered to the Internal Revenue Service for its review. The original documents from which the copies were made were then returned to the Clerk of the state court. Pet. Br. 8.

On May 24, 1991, petitioner filed a renewed emergency motion for a stay pending appeal. On May 30, 1991, the court of appeals denied that motion and ordered petitioner to show cause why its appeal should not be dismissed as moot.[9] On September 10, 1991, the court of appeals dismissed the appeal, concluding that this case is moot because "the tapes have been turned over to the IRS in compliance with the summons enforcement order" and no actual, present

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[9] On May 31, 1991, the Church filed a second emergency motion for a stay pending appeal. That motion was denied by the court of appeals on the same day. See Pet. Br. 8.

controversy therefore exists (Pet. App. 2a, citing *United States* v. *Kersting*, 891 F.2d 1407 (9th Cir. 1989), cert. denied, 111 S. Ct. 49 (1990)).

SUMMARY OF ARGUMENT

Since the documents requested by the IRS summons have been produced, petitioner's continued opposition to enforcement of the summons is moot. The "case" or "controversy" required to support the exercise of jurisdiction by an Article III court "must concern the subject matter of the action" over which the court has subject matter jurisdiction. *United States* v. *Kis*, 658 F.2d 526, 533 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982). The subject matter of a summons enforcement action, and the subject matter jurisdiction of the federal courts under 26 U.S.C. 7402(b), 7604(a), is limited to determining whether "to compel * * * production" of the requested information (*ibid.*). Once production has occurred, the only issue for which subject matter jurisdiction exists under the statute—whether production should be *compelled*—has become moot. This conclusion is equally true whether production is made directly by the taxpayer or by any third party to whom the summons is addressed.

Petitioner's additional argument that the government should not be permitted continued "use of" (Pet. Br. 13) the copies of the documents produced pursuant to the summons (or of information derived therefrom) also fails to present a justiciable claim. Such a claim "obviously is premature and may be considered if and when proceedings arise in which the Government seeks to use the documents or information obtained from them" (*G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 359 (1977)).

ARGUMENT

WHETHER THE SUMMONS SHOULD BE ENFORCED IS A MOOT QUESTION

Under Article III, Section 2 of the Constitution of the United States, the judicial power of the United States extends only to "cases" and "controversies." It is the duty of the court "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills* v. *Green*, 159 U.S. 651, 653 (1895). See *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). The "actual controversy" must exist "at all stages of review, not merely at the time the complaint is filed." *Preiser* v. *Newkirk*, 422 U.S. at 401; *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974). A case that presented a live controversy when the complaint was filed may become moot prior to entry of the district court's decision or on appeal or after a petition for a writ of certiorari has been filed. *DeFunis* v. *Odegaard*, 416 U.S. 312, 316-320 (1974). A case that has become moot does not present an Article III "case" or "controversy" and must therefore be dismissed. See *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 228-229 (1937); *Brownlow* v. *Schwartz*, 261 U.S. 216, 217-218 (1923); *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472 (1990). See also 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.1, at 218-219 (2d ed. 1984).

In the present case, the court of appeals held that the MCCS tapes were within the scope of the crime-fraud exception and should be produced by the Clerk

of the Superior Court pursuant to the summons (Pet. App. 15a).[10] That order was complied with by the Clerk of the Superior Court, after the courts below and this Court denied petitioner's numerous stay motions. Since copies of the MCCS tapes have now been produced to the IRS pursuant to the summons, there

[10] This case comes before the Court in what fairly may be described as an unusual procedural context. The question that petitioner seeks to litigate—whether the documents requested in the IRS summons should be produced—has been fully adjudicated and finally decided adversely to petitioner. *United States* v. *Zolin*, 905 F. 2d 1344 (9th Cir. 1990), cert. denied, 111 S. Ct. 1309 (1991). To implement, or execute, that final judgment, the United States applied to the district court for an order directing production of the requested documents. The district court issued the requested order, noting that "[l]itigation must end sometime" (Pet. App. 6a) and that the court's authority was limited to enforcing, not relitigating, the judgment entered by the court of appeals (*ibid.*).

Petitioner nonetheless appealed the order entered by the district court, again seeking to relitigate the merits of the judgment previously entered by the court of appeals. The court of appeals declined to consider the appeal, noting that the documents at issue had been produced pursuant to the district court's order and that petitioner's renewed challenge to the validity of the summons was therefore moot.

Petitioner's unceasing efforts to relitigate matters finally determined against it were properly rejected by the district court. The courts, as well as petitioner, are bound by the prior, final judgment in *United States* v. *Zolin*, 905 F.2d at 1344. Precisely because "[l]itigation must end sometime" (Pet. App. 6a), this conclusion is true even if, as petitioner erroneously continues to claim, the challenged judgment is not "free from error" (1B *Moore's Federal Practice* ¶ 0.405[4.-1], at 197-198 (2d ed. 1992); see also *United States* v. *Throckmorton*, 98 U.S. 61 (1878)). These peculiar, independent obstacles to petitioner's contentions were brought to the Court's attention in our brief in opposition to certiorari in this case (at 4-5, 13-14). See this Court's Rule 15.1.

is no continuing, live controversy with respect to whether the summons may be enforced. Because that was the only issue the federal courts had jurisdiction to determine in the summons enforcement proceedings under 26 U.S.C. 7426(b), 7604(a), any further opinion that the court might render in this case would be advisory in nature. The court of appeals therefore properly dismissed the appeal as moot.

A. The Jurisdiction Of The Federal Courts In An IRS Summons Enforcement Case Is Limited To Determining Whether To Compel Production Of The Information Requested By The Summons

Because "[f]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them" (*North Carolina* v. *Rice*, 404 U.S. at 246), the case or controversy that must exist to support Article III jurisdiction "cannot be just any dispute between the parties but must concern the subject matter of the action." *United States* v. *Kis*, 658 F.2d at 533. The jurisdiction of the federal district courts is derived "wholly from the authority of Congress." *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 234 (1922). The district courts therefore lack power to decide questions that are unrelated to the subject matter of the action upon which their jurisdiction is founded. *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). This is especially so in cases involving the United States. The "United States, as sovereign, is immune from suit save as it consents to be sued" (*ibid.*), and "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Ibid.*

The subject matter of the summons enforcement action, and the subject matter jurisdiction of the federal courts under 26 U.S.C. 7402(b), 7604(a), is

limited to determining whether "to compel * * * production" of the requested information (*ibid.*). Once, as here, production has occurred, the only issue for which subject matter jurisdiction exists under the statute—whether production should be compelled—has become moot. *United States* v. *Kis*, 658 F.2d at 532-535. For this reason, courts routinely have "held that compliance with an IRS summons moots an appeal of the enforceability of the summons." *Id.* at 532 & n.10 (citing, *e.g.*, *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), cert. denied, 449 U.S. 1021 (1980); *United States* v. *Deak-Perera International Banking Corp.*, 610 F.2d 89 (2d Cir. 1979); *Vesco* v. *SEC*, 462 F.2d 1350 (3d Cir. 1972); *Kurshan* v. *Riley*, 484 F.2d 952 (4th Cir. 1973); *Lawhon* v. *United States*, 390 F.2d 663 (5th Cir. 1968); *United States* v. *Patmon*, 630 F.2d 458 (6th Cir. 1980); *United States* v. *Olson*, 604 F.2d 29 (8th Cir. 1979)).[11]

[11] "Every circuit that has considered this question, except the Third Circuit, see *Gluck* v. *United States*, 771 F.2d 750, 754 (3d Cir. 1985), has held that compliance with an IRS summons moots an appeal of the enforceability of the summons." *United States* v. *Kersting*, 891 F.2d at 1410 n.8. See, *e.g.*, *Hintze* v. *IRS*, 879 F.2d 121, 124-125 (4th Cir. 1989); *United States* v. *Church of World Peace*, 878 F.2d 1281 (10th Cir. 1989); *United States* v. *Sherlock*, 756 F.2d 1145, 1146-1147 (5th Cir. 1985); *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1278-1279 (7th Cir. 1984); *United States* v. *Kis*, 658 F.2d 526, 533 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Equity Farmers Elevators*, 652 F.2d 752 (8th Cir. 1981); *United States* v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710, 711 (9th Cir. 1981); *United States* v. *Deak-Perera International Banking Corp.*, 610 F.2d 89 (2d Cir. 979); *Kursham* v. *Riley*, 484 F.2d 952 (4th Cir. 1973); *United States* v. *Lyons*, 442 F.2d 1144, 1145 (1st Cir. 1971). See also 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3533.2, at 246 n.35 (2d ed. 1984 & Supp. 1992).

1. Congress has conferred authority upon the Secretary of the Treasury to make accurate determinations of tax liability and has granted him broad authority to conduct investigations for that purpose. As the Secretary's delegate, the Commissioner of Internal Revenue is charged with the duty to make inquiries, determinations and assessments of all taxes imposed by the Internal Revenue Code. See 26 U.S.C. 7601-7603; *Donaldson* v. *United States*, 400 U.S. 517, 523-524 (1971); *United States* v. *McAnlis*, 721 F.2d 334, 336 (11th Cir. 1983), cert. denied, 467 U.S. 1227 (1984).

The summons power is the means provided by Congress to enable the Commissioner to discharge this investigative responsibility. Section 7602 of the Code authorizes the Commissioner, "[f]or the purpose of ascertaining the correctness of any return, making a return where none have been made, [or] determining the liability of any person for any internal revenue tax, * * * [t]o examine any books, papers, records or other data which may be relevant or material to such inquiry" and to summon any person to appear and produce such documents and to give relevant testimony. 26 U.S.C. 7602.[12] Section 7602 pro-

[12] The proper limits of the district court's inquiry in a summons enforcement proceeding were delineated in *United States* v. *Powell*, 379 U.S. 48, 57-59 (1964). To obtain enforcement, the government need only show that "the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *Id.* at 57-58. The Court added that this does not mean that the district court cannot make any inquiry at all into the underlying reasons for the summons, stating that "a court may not permit its process to be abused." *Id.* at 58. "Such an abuse would take place if the

vides the IRS with expansive information-gathering authority so that effective tax investigations may be conducted. See *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 813-815 (1984); *United States* v. *Euge*, 444 U.S. 707, 714-717 (1980); *United States* v. *Saunders*, 951 F.2d 1065, 1067 (9th Cir. 1991); *Hintze* v. *IRS*, 879 F.2d 121, 125 (4th Cir. 1989).[13]

2. As is ordinarily the case when administrative agencies are granted subpoena power, the IRS lacks authority to compel obedience to its orders by means of contempt or other sanctions. See *Reisman* v. *Caplin*, 375 U.S. 440, 445-446 (1964). If the summoned party refuses to produce the requested documents, the IRS must seek judicial enforcement of the summons. Sections 7402(b) and 7604(a) of the Code confer a limited jurisdiction on the federal district courts for this purpose. These statutes provide (26 U.S.C. 7402(b), 7604(a)) (emphasis added):

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summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose of reflecting on the good faith of the particular investigation." *Ibid.* The burden of showing such an abuse, however, is on the party challenging enforcement. *Ibid.* Under the framework established in *Powell*, a summons is to be enforced if issued in "good faith" in furtherance of a legitimate purpose for which the use of the summons authority has been authorized by Congress. See also *United States* v. *Stuart*, 489 U.S. 353, 370 (1989); *United States* v. *Bisceglia*, 420 U.S. 141, 145-146 (1975); *Donaldson* v. *United States*, 400 U.S. at 526-527; *United States* v. *Kis*, 658 F. 2d at 535-536.

[13] This Court has described Section 7602 as the "centerpiece" of the statutory scheme endowing the IRS with expansive authority to conduct effective tax investigations. *United States* v. *Arthur Young & Co.*, 465 U.S. at 816. See also *Holifield* v. *United States*, 909 F. 2d 201, 205 (7th Cir. 1990).

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, [records,] or other data, *the district court* of the United States for the district in which such person resides or may be found *shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, [records,] or other data.*[14]

The jurisdiction conferred by Sections 7402(b) and 7604(a) is expressly limited to entering an order directing the summoned party to comply with the summons in whole or in part, or denying enforcement. *United States* v. *First National State Bank*, 540 F.2d 619, 625 (3d Cir. 1976). The sole purpose of the summons enforcement proceeding is to determine whether the government is entitled to peremptory process to obtain information for its investigation. Only matters bearing upon that question are within the narrow jurisdiction thus provided. Federal courts therefore lack jurisdiction in a summons enforcement action to decide questions unrelated to whether peremptory process should be issued. See, *e.g.*, *Reisman* v. *Caplin*, 375 U.S. at 441-443 (complaint seeking to declare IRS summons null and void dismissed for want of equity); *United States* v. *Abrahams*, 905 F.2d 1276, 1286-1287 (9th Cir. 1990) (court lacks jurisdiction in summons enforcement case to enjoin IRS from interviewing attorney's clients); *United States* v. *Barrett*, 837 F.2d 1341, 1350 (5th Cir. 1988) (en banc), cert. denied, 492 U.S. 926 (1989) ("In a summons enforcement proceeding, the district court's only task is to determine whether the summons should or should not be en-

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[14] The word "records" appears in Section 7604(a) but not in Section 7402(b). See 26 U.S.C. 7402(b), 7604(a).

forced."); *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275 (7th Cir. 1984) (taxpayer not entitled to injunction to restrain IRS use of documents produced in summons enforcement case); *United States* v. *Kis*, 658 F.2d 526, 533 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982) (post-enforcement suppression remedies are not proper in IRS summons cases).

The district court's jurisdiction in a summons enforcement proceeding does not include authority to supervise the summoned material once it has been supplied to the IRS.[15] The court's authority is, in-

[15] The district court's limited jurisdiction under 26 U.S.C. 7402(b), 7604(a), is emphasized by the Tax Anti-Injunction Act, 26 U.S.C. 7421(a). That statute withdraws jurisdiction from the federal courts over suits brought for the "purpose of restraining the assessment or collection of any tax." *Ibid.* This restriction on jurisdiction is "equally applicable to activities leading up to, and culminating in, such assessment and collection" (*Lowrie* v. *United States*, 824 F.2d 827, 830 (10th Cir. 1987)), such as IRS investigative activity. See, *e.g.*, *Zimmer* v. *Connett*, 640 F.2d 208, 210 (9th Cir. 1981) (Tax Anti-Injunction Act prohibits enjoining IRS inspection of taxpayers' books and records); *Koin* v. *Coyle*, 402 F.2d 468, 469 (7th Cir. 1968) (Act bars suit to enjoin IRS from using evidence to make tax assessments); *Black* v. *United States*, 534 F.2d 524, 527 (2d Cir. 1976).

In *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1278 (7th Cir. 1984), the court of appeals rejected a taxpayer's request to enjoin the IRS from using materials produced pursuant to a summons, noting that the Tax Anti-Injunction Act bars a taxpayer from "seeking to enjoin the IRS from acquiring or using the information necessary * * * to determine a proper tax assessment." The court stated that "[a]bsent a clear indication allowing remedial powers for the court once the IRS obtain summoned documents," the Tax Anti-Injunction Act deprives the court of jurisdiction "to stop the IRS from using those documents." *Id.* at 1278-1279.

stead, to determine whether the taxpayer's objections to the summons are valid. If the objections are not valid, the court may exercise its "jurisdiction * * * to compel * * * production of" the information requested by the summons. 26 U.S.C. 7402(b), 7604(a). If the taxpayer's objections are valid, the court is then *not* "to compel * * * production" (*ibid.*).

Once compliance has occurred, the summons process is over. Compliance quite obviously renders moot the question whether to issue peremptory process to enforce the summons.[16] Since the case or controversy required to support the exercise of federal jurisdiction cannot be just *any* dispute between the parties, but must "concern the subject matter of the action" for which jurisdiction has been conferred (*United States* v. *Kis*, 658 F.2d at 533), compliance with the summons deprives the courts of any further jurisdiction. The summons enforcement case is moot, and no other basis for subject matter jurisdiction exists in that proceeding. See note 15, *supra*. For this reason, the court of appeals correctly held that the "case" or "controversy" requirement of Article III is no longer satisfied once compliance with the summons has occurred. See, *e.g.*, *United States* v. *Kersting*, 891 F.2d at 1410 n.8; *United States* v. *Sherlock*, 756 F.2d at

[16] A summons enforcement case is not a final adjudication on the merits of a taxpayer's liabilities. *United States* v. *Barrett*, 837 F.2d at 1349. See also *United States* v. *Harper*, 662 F.2d 335, 336 (5th Cir. 1981). Cf. *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980). It is a proceeding ancillary to the duty of the Secretary of the Treasury "to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax." 26 U.S.C. 7601(a). The summons authority contained in Section 7602 of the Code enables the Secretary to carry out this function.

1146-1147; *United States* v. *Kis*, 658 F.2d at 533; cases cited page 12 & note 11, *supra*.

B. The Claim That The United States Should Be Enjoined From Further Use Of The Documents Produced Pursuant to the Summons Is Not Justiciable

Petitioner contends that this case is not moot even *after* compliance with the summons because the district court could enter an order directing the Internal Revenue Service to cease "use of" (Pet. Br. 13) the information that has been produced.[17] That claim, however, is not justiciable.

This Court has frequently had occasion to consider whether the United States may be ordered to cease use of information obtained through its investigative activities. When such claims are raised in advance of trials or other adjudicative proceedings designed to enforce substantive liabilities, the Court has consistently concluded that a request to enjoin government use of information "obviously is premature" (*G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 359 (1977)). A request to enjoin the government from using information obtained through investigative processes may be considered only "if and when proceedings arise in which the Government seeks to use the documents or information." *Ibid.* To the extent the taxpayer possesses a valid right to seek suppression of the documents (or of any information derived from them), he may assert that claim "in due course at its proper place in any subsequent trial." *Donald-*

[17] For the reasons explained in note 10, *supra*, the underlying premise of petitioner's argument—that the district court could reverse the prior final, nonappealable judgment of the court of appeals ordering enforcement of the summons (see note 8, *supra*)—lacks any basis in this case.

son v. *United States*, 400 U.S. at 531. See also *United States* v. *Blue*, 384 U.S. 251, 255 (1966) ("Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial.").

It is settled beyond peradventure that Article III of the Constitution does not allow federal courts to rule upon hypothetical controversies involving purely speculative future events. *Muskrat* v. *United States*, 210 U.S. 346 (1911). As the Seventh Circuit held in *United States* v. *Kis*, 658 F.2d at 533, "[i]t would be highly speculative" to rule on the legality of an IRS summons *after* compliance "for there is no guarantee that the Government will ever seek to use the summoned evidence." *Ibid.* Petitioner's request to bar the government from future use of information produced pursuant to the summons therefore "should not be considered until the time when the Government seeks to use that evidence." *United States* v. *Kis*, 658 F.2d at 533.[18] There is "no need, nor would it be proper, to decide that question now." *Ibid.*

The potential, future controversy that may arise concerning proper uses of the summoned information is, at present, merely hypothetical. Petitioner's suggestion (Pet. Br. 13) that the United States should be prohibited from using that information in the future therefore does not present a justiciable ques-

[18] The court of appeals has already finally adjudicated the merits of the crime-fraud issue and has determined that the documents are properly subject to the summons. See note 8, *supra*. It is thus particularly speculative in this case to claim that additional rulings will be required to resolve this issue in the future. See note 10, *supra*.

tion. See *United States* v. *Kersting*, 891 F.2d at 1411; *Hintze* v. *IRS*, 879 F.2d 121, 125 (4th Cir. 1989); *United States* v. *Sherlock*, 756 F.2d 1145, 1147 (5th Cir. 1985); *SEC* v. *Laird*, 598 F.2d 1162, 1163 (9th Cir. 1979) ("Appellants may adequately protect their asserted interests by seeking to suppress such [previously subpoenaed and produced] information in any subsequent proceeding.").[19] See also *Donaldson* v. *United States*, 400 U.S. at 531; *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *United States* v. *First American Bank*, 649 F.2d 288, 289 n.3 (5th Cir. 1981); *United States* v. *Lyons*, 442 F.2d 1144, 1145 (1st Cir. 1971).

IRS summons enforcement proceedings are designed to be "summary" in character. *Donaldson* v. *United States*, 400 U.S. at 529. "The enforcement proceeding should be concluded expeditiously so that the actual investigation can be continued with the goal of reaching the final determination of whether there will be any civil or criminal liability for the taxpayer."

[19] Dismissal of an appeal as moot does not jeopardize an appellant's substantive rights: after an appeal is dismissed as moot, the order appealed from is to be vacated by the district court (because that order became moot before it became final). This procedure is followed "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences," *United States* v. *Munsingwear, Inc.*, 340 U.S. at 41, and "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance" (*id.* at 40). See also *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). This procedure leaves the affected parties with the ability to challenge the introduction of materials produced in compliance with the enforcement order at any subsequent proceeding, either civil or criminal. *Donaldson* v. *United States*, 400 U.S. at 531; *United States* v. *Munsingwear*, 340 U.S. at 39-41. But see note 10, *supra*.

United States v. *Barrett*, 837 F.2d at 1349.[20] Post-enforcement proceedings involving suppression of summoned records conflict with, and burden, the "summary" summons enforcement scheme Congress provided.[21] Such proceedings would also afford an opportunity for the summoned party to subject IRS tax investigations to repeated scrutiny and harassment.

As this case reveals with painful clarity, litigation over IRS summonses often entails a prolonged struggle between the government's attempts, in a timely fashion, to obtain information necessary to its investigations and taxpayers' attempts to delay those investigations. Allowing taxpayers to employ the forum of a summons enforcement proceeding to litigate suppression questions in advance of trial would lead to the courts' repeated involvement in IRS investigations. That further burden upon summons litigation would threaten to create harmful delays in tax investigations. Congress did not authorize the creation of such delays by providing jurisdiction to the district courts "to compel * * * production" of docu-

[20] For example, in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), the Court rejected the contention that the motives of the IRS agent who caused the summons to be issued could be inquired into as part of the summons enforcement proceeding under 26 U.S.C. 7402(b), 7604(a). The Court expressed concern that such extraneous inquiries would unduly delay the summary proceeding envisioned by the statute. 437 U.S. at 316.

[21] This Court has emphasized on several occasions that the summons power is a broad one and that "restrictions upon the IRS summons power should be avoided 'absent unambiguous directions from Congress'." *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 318 (1985); *United States* v. *Arthur Young & Co.*, 465 U.S. at 816; *United States* v. *Bisceglia*, 420 U.S. at 150.

ments requested in an IRS summons (26 U.S.C. 7402(b), 7602(a)).

A rule permitting district courts to extend their jurisdiction in summons enforcement actions to post-enforcement supervision over the IRS's use of the summoned material would " 'stultify' and unduly delay the investigation" into taxpayer compliance with the internal revenue laws (*United States* v. *Ernst & Whinney*, 750 F.2d 516, 520 (6th Cir. 1984) (quoting *Donaldson* v. *United States*, 400 U.S. at 531)). It would also require federal courts to issue advisory opinions on hypothetical controversies. Since the federal judiciary lacks jurisdiction under Article III to issue advisory opinions, the court of appeals correctly dismissed the appeal in this case as moot.

C. The Cases Upon Which Petitioner Relies Do Not Support The Proposition That This Case Is Not Moot

1. As the Ninth Circuit correctly observed in *United States* v. *Kersting*, "[e]very circuit that has considered this question, except the Third Circuit, see *Gluck* v. *United States*, 771 F.2d 750, 754 (3d Cir. 1985), has held that compliance with an IRS summons moots an appeal of the enforceability of the summons." 891 F.2d at 1410 n.8. Petitioner's reliance (Pet. Br. 17) on the singular decision of the Third Circuit in *Gluck* is unavailing.

The panel majority in *Gluck* held that "the surrendering of the documents to the IRS does not end the controversy." 771 F.2d at 754. The court based that holding on the rejected theory that the federal courts retain jurisdiction *after* compliance to prohibit the government's "use of the summoned documents." *Ibid.* As Judge Garth stated in dissent in *Gluck*, the court should not (*id.* at 759)

> rely upon the completely speculative possibility that future criminal or civil proceedings may be instituted against the [taxpayers] to endow their present appeal with a vitality it no longer possesses. Should the government initiate any subsequent proceedings against the [taxpayers, they] may move to suppress the use of any information which was obtained by the government as a result of compliance with the summonses. *See, e.g., G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 359 (1977); *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971).

Gluck stands alone in suggesting that 26 U.S.C. 7402(b) and 7604(a) confer jurisdiction on the courts to render advisory opinions on the proper future use of summoned information. See 771 F.2d at 760 (Garth, J., dissenting). *Gluck* is also inconsistent with the Third Circuit's own prior decision in *Vesco* v. *SEC*, which held that compliance with an SEC subpoena "obviated the 'case or controversy' originally surrounding the subpoena" (462 F.2d at 1351) and therefore required dismissal of the appeal from the order enforcing the subpoena as moot (*ibid.*). See 771 F.2d at 759 (Garth, J., dissenting).

Gluck is thus isolated—in a minority of one—on the issue addressed in this case. Petitioner seriously misstates the law in implying that *Gluck* is an "example" of the decisions of "numerous courts" (Pet. Br. 16, 17) holding that compliance with a summons does not moot the summons enforcement proceedings.[22]

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[22] Petitioner offers *Cardwell* v. *Kurtz*, 765 F.2d 776 (9th Cir. 1985), as one other "example" of its proposition (Pet. Br. 18). The *Cardwell* case did not involve an IRS summons; nor did it involve the limited jurisdiction of the district courts "to compel * * * production" (26 U.S.C. 7402(b), 7604(a)) of documents pursuant to such a summons. Instead, *Cardwell*

"Numerous courts" have, instead, held quite clearly to the contrary. See *United States* v. *Kersting*, 891 F.2d at 1410 n.8 (citing cases).

2. Petitioner also errs in relying (Pet. Br. 18-21) on *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), and *In re Grand Jury Subpoena Dated June 5, 1985 (Doe)*, 825 F.2d 231 (9th Cir. 1987). Those cases involve the supervisory authority of federal courts to restrain continuing violations of grand jury secrecy; they do not concern the limited jurisdiction provided by 26 U.S.C. 7402(b), 7604(a), to "compel * * * production" of documents requested in an IRS summons.

Rule 6(e) of the Federal Rules of Criminal Procedure codifies the traditional rule of grand jury secrecy. In *Sells Engineering*, this Court held that an appeal involving allegations of continuing, new improper disclosures of grand jury materials was not moot because prospective relief preventing such improper future disclosures could be granted. 463 U.S. at 422 n.6 (quoting *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d 1184, 1187-1188 (9th Cir. 1981)). In *Sells*, the court of appeals had ordered such prospective relief as "a proper means to prevent further disclosure before it occur[red]." 642 F.2d at 1188. At the same time, however, the court of appeals recognized that "the availability

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involved a claim that IRS agents had obtained documents from a business *without* a summons or other lawful process by engaging in "fraud, deceit and trickery" (765 F.2d at 778). In concluding that suit for recovery of documents obtained by fraud could proceed, the court of appeals did not purport to—and did not—alter the established rule of that circuit that "compliance with an IRS summons moots an appeal of the enforceability of the summons" (*United States* v. *Kersting*, 891 F.2d at 1410 n.8).

of a motion to suppress in future proceedings provides a remedy for improper disclosures that have already occurred. *Ibid.*

There is no doubt that district courts have inherent power to supervise grand juries and enforce "legally compelled standards of prosecutorial conduct" (*United States* v. *Williams*, No. 90-1972 (May 4, 1992), slip op. 10).[23] The grand jury is an arm of the court itself. Requiring offending officials to prevent continuing violations of grand jury secrecy is necessary to preserve the integrity of the court and the criminal justice process. Absent allegations of improper *future* disclosures to persons not authorized to review the grand jury materials, however, disclosure to authorized persons moots the controversy concerning the propriety of past disclosures. See *In re Federal Grand Jury Investigation (McElroy)*, 718 F.2d 875, 876 (8th Cir. 1983); *In re Corrugated Container Grand Jury*, 659 F.2d 1330 (5th Cir. 1981), cert. denied, 456 U.S. 937 (1982). For past disclosures, a motion in future civil or criminal proceedings to suppress use of unlawfully obtained evidence is the

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[23] Some courts have held that there is an inherent, "anomalous" jurisdiction over constitutional claims under 28 U.S.C. 1331 to prevent or remedy illegal acts by federal agents. See, *e.g.*, *Linn* v. *Chivatero*, 714 F.2d 1278 (5th Cir. 1983); *Hunsucker* v. *Phinney*, 497 F.2d 29 (5th Cir. 1974). Contrary to petitioner's contentions (Br. 24), however, to the extent "anomalous" jurisdiction exists at all, it does not exist unless the facts demonstrate a callous disregard of the taxpayer's *constitutional rights* for which equitable relief is appropriate. There has been no suggestion, much less any showing, of a constitutional violation in this case. Nor have the cases involving "anomalous" jurisdiction suggested that this theory provides a jurisdictional basis for ordering the return of records obtained by the IRS pursuant to a summons enforcement order.

proper remedy for improper grand jury disclosures. *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d at 1188.[24]

The IRS is a separate federal agency, not an arm of the federal courts. Unlike cases involving breaches of grand jury secrecy, IRS investigations are not subject to continuing supervision by the district courts. See note 15, *supra*. And, unlike the situation in *Sells*, there are no allegations in this case that continuing, improper disclosures of confidential information to unauthorized persons are occurring. To the contrary, the disclosure involved in this case was made pursuant to an order restricting the IRS from disclosing the materials to other agencies. See note 4, *supra*. See also 26 U.S.C. 6103 (restricting IRS disclosure of taxpayer return information). The availability of a motion to suppress in future civil proceedings provides an appropriate remedy for any alleged improper *past* disclosure by the Service of the summoned information. *United States* v. *Kis*, 658 F.2d at 533; *In re Grand Jury Investigation No. 78-174 (Sells, Inc.)*, 642 F.2d at 1188.

Unlike *Sells*, there is no suggestion in this case that improper, future disclosures to unauthorized persons will occur. Any issue relating to the IRS's future use of the summoned materials "obviously is premature" (*G.M. Leasing Corp.* v. *United States*, 429 U.S. at 359) and does not directly bear on the district court's narrow summons enforcement jurisdiction. The speculative possibility that a future controversy may arise concerning future disclosures *by* the IRS

[24] Cf. *McQueen* v. *Bullock*, 907 F.2d 1544, 1551 (5th Cir. 1990) (taxpayer's action against United States for alleged violations of grand jury secrecy barred by sovereign immunity).

cannot serve as a basis for continuing jurisdiction over a case that concerns the moot question whether disclosures are to be made *to* the IRS.

3. Decisions involving Federal Trade Commission subpoenas, on which petitioner erroneously relies (Pet. Br. 22-23), are consistent with the conclusion that compliance with an IRS summons moots an appeal from an order enforcing the summons. Those cases, such as *FTC* v. *Gibson Products of San Antonio, Inc.*, 569 F.2d 900 (5th Cir. 1978), are distinguishable. They concern appeals from orders enforcing FTC subpoenas issued during the course of ongoing adjudicative proceedings. In *Gibson Products*, the court of appeals held that the challenge to the subpoenas was not moot, despite compliance with them, because the court could enter "an order requiring the FTC to return the subpoenaed documents and *to forbid use of the material in the adjudicatory hearing*." *Id.* at 903 (emphasis added). The subpoenas at issue in *Gibson Products* were adjudicative subpoenas, issued for discovery purposes in a case then pending before the FTC.[25] Reversal of the order enforcing the adjud-

[25] The court of appeals emphasized in *Gibson Products* that "these are adjudicative subpoenas issued after the filing of the complaint, and not investigative subpoenas." 569 F. 2d at 904.

In the recent decision of the District of Columbia Circuit in *FTC* v. *Invention Submission Corp.*, No. 91-5174 (June 2, 1992), the court did not consider this distinction in concluding that compliance with an FTC *investigative* subpoena "does not moot the controversy." Slip op. 4 n.1. The *Invention Submission* court had no reason to consider *Gibson Products*, and addressed the mootness issue only in a brief footnote, because the parties did not contend that the *Gibson Products* distinction was applicable to that case (see *ibid.*). Instead, in *Invention Submission*, the court cited *Office of*

icative subpoena not only divested the FTC of the documents, but prevented their use in the then-ongoing proceeding.[26]

Thrift Supervision v. *Dobbs*, 931 F.2d 956 (D.C. Cir. 1991), as support for the statement that compliance with an investigative subpoena does not moot the enforcement case. Slip op. 4 n.1.

In *Office of Thrift Supervision* v. *Dobbs*, however, the court held that compliance with an investigative subpoena *does* moot the enforcement case (931 F.2d at 957-958) and that "concern about future government action that may never even occur is insufficient to create a concrete present controversy." *Id.* at 958. The court noted in *Dobbs* that the subpoenaed party had not requested return of the "documents he provided" and that questions concerning who should be given "custody" of the documents were therefore not presented in that case (*ibid.*). The court stated in dicta, however, that *Gibson Products* indicates that a claim seeking to enjoin further *use* of the documents by the government would not be sufficient to keep the enforcement action alive in the context of an investigative, rather than adjudicative, subpoena. *Ibid.* While noting that the Third Circuit's decision in *Gluck* pointed the other way, the court suggested that *Gluck* was not correctly decided. See 931 F.2d at 959.

[26] These decisions involving FTC adjudicative subpoenas all antedate this Court's decision in *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980), holding that the FTC's issuance of a complaint did not constitute final agency action reviewable before the conclusion of the administrative adjudication. The rationale of the *Standard Oil* decision casts doubt on whether the admissibility of information obtained through FTC adjudicative subpoenas should be addressed in the subpoena enforcement proceedings. That, however, is because of the Court's interpretation of the finality requirement of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, not the constitutional case or controversy requirement. Because the IRS summons authority under 26 U.S.C. 7602(a)(1) expressly extends to any materials that "may be relevant" to the tax investigation, the question of admissibility *vel non* of particular materials in a possible future adjudicative proceeding is obviously not germane in an IRS summons enforcement proceeding.

A decision on the merits of the appeal in cases such as *Gibson Products* affects the rights of parties with regard to the availability and admissibility of evidence in then-pending adjudicative proceedings before the FTC. By contrast, a decision on the merits of petitioner's appeal in this IRS summons enforcement case would not affect the rights of the parties in any ongoing adjudicative proceeding. Indeed, nothing but speculation suggests that there will ever be an adjudicative proceeding at which the United States will seek to use the summoned materials or offer them into evidence. If such an adjudicative proceeding hereafter occurs, the affected parties will then be free at that time to challenge the introduction of the material. See *United States* v. *Kis*, 658 F.2d at 533.[27]

D. The Fact That The Summons Was Issued To And Complied With By A Party Other Than The Taxpayer Does Not Make This Moot Case Justiciable

Petitioner contends (Pet. Br. 25-30) that the fact that the summons was issued to, and the documents

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[27] *Casey* v. *FTC*, 578 F.2d 793 (9th Cir. 1978), on which petitioner relies (Pet. Br. 23), is inapposite. In *Casey*, the Ninth Circuit held that compliance with an FTC subpoena had not mooted an appeal even though the appellant had produced all of the requested documents. In so ruling, the court of appeals emphasized that, since the documents had not been verified, as required by the subpoena, full compliance had not occurred and the controversy was therefore still live. 578 F.2d at 798. In *Casey*, the Ninth Circuit did not purport to—and did not—reject the established rule of that circuit that compliance with an IRS summons makes an appeal from an order enforcing the summons moot. See *United States* v. *Kersting*, 891 F.2d at 1410-1411.

were surrendered by, a third party, rather than petitioner, prevents this case from being moot. That difference in the method of compliance does not create a distinction for the purpose of the constitutional case or controversy requirement.

Contrary to petitioner's contentions, the many decisions holding that compliance with an IRS summons renders moot further litigation concerning enforcement of the summons are not limited to situations where a taxpayer, as distinguished from a disinterested third party, complies with the summons. See, *e.g.*, *United States* v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710, 711 (9th Cir. 1981) (taxpayer's appeal of order enforcing IRS summons mooted by accountant's compliance with summons); *Hintze* v. *IRS*, 879 F.2d at 124-125 (third-party's compliance with IRS summons enforcement order precludes exercise of appellate jurisdiction); *United States* v. *First American Bank*, 649 F.2d 288, 289 (5th Cir. 1981) (same); *United States* v. *Deak-Perera International Banking Corp.*, 610 F.2d 89 (2d Cir. 1979) (same). Those decisions rest on the same rationale underlying this Court's holding in *Donaldson* v. *United States*, 400 U.S. at 531, that the taxpayer lacks sufficient interest to be allowed to intervene in a summons enforcement proceeding seeking records from a third party because the taxpayer's claims may be made "in due course * * * in any subsequent trial." [28]

The two allegedly conflicting cases on which petitioner purports to rely (Pet. 27-28, citing *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720, 724

[28] Congress subsequently enacted 26 U.S.C. 7609, conferring a right on taxpayers to intervene in summons enforcement proceedings involving certain, but not all, categories of third parties. See 26 U.S.C. 7609(a)(3).

(1st Cir.), cert. denied, 449 U.S. 1021 (1980); *United States* v. *Kersting*, 891 F.2d at 1411 n.9) do not support the conclusion that compliance with a summons by a disinterested third party does not moot an appeal. In *Arthur Andersen & Co.*, the court of appeals held that an appeal from a summons enforcement order by an accounting firm that was not the target of the investigation was rendered moot by its compliance with the summons. In so holding, the court rejected the accountants' contention that their appeal fell within the category of cases excepted from mootness on the theory that they are "capable of repetition yet evading review." 623 F.2d at 723. As the court observed, as is the case with a party that is itself the target of a tax investigation, a third party "can refuse to comply and litigate the merits of the summons as a defense to a contempt citation." *Ibid.*[29] And, in *United States* v. *Kersting*, *supra*, the court simply observed that it did not have a "disinterested third party" before it and thus expressed no opinion as to whether that would have any bearing on its analysis. 891 F.2d at 1411 n.9. Nothing in *Arthur Andersen & Co.* or *Kersting* supports petitioner's claim that an appeal is not moot when a party other than the taxpayer complies with an IRS summons.

Petitioner's argument ignores the fact that it is the very act of compliance—not the status of the party that complies—that ends the controversy sur-

[29] In *Arthur Andersen & Co.*, the court of appeals declined to decide whether a case involving a third party that lacked "sufficient incentive to risk contempt in order to avoid compliance with [a] summons" would present a "compelling circumstance[]" that would justify "deciding an otherwise moot case." 623 F. 2d at 725. No court has held that a moot case becomes justiciable if "compelling circumstances" exist.

rounding the enforceability of the summons. As Judge Garth explained in his dissenting opinion in *Gluck* (771 F.2d at 760 n.2; emphasis added):

> However, because compliance may result from the actions of a third party does nothing to ensure that future proceedings, in which the introduction of information obtained by means of a challenged summons is sought, will be initiated. *Whether the taxpayer himself or some third party complies is thus ultimately irrelevant to the mootness issue.* This is necessarily so since it is the very act of compliance, rather than the individual or institution which complies, that ends the controversy surrounding the enforceability of any particular summons. *Until some subsequent proceeding is commenced, no concrete controversy demanding decision exists.*

CONCLUSION

The order of the court of appeals dismissing the appeal as moot should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA and FRANK S. ZOLIN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Dated: July 27, 1992

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No. 91-946

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REPLY BRIEF FOR THE PETITIONER

The Brief for the United States begs the central questions in this case -- whether a live concrete controversy remains between the parties and whether *any* effective relief remains available to the petitioner should it prevail on the merits. Instead, the government argues repetitively and irrelevantly that the district court's subject matter jurisdiction is limited to whether to order production of the summoned information, but it fails to address the appellate court's role if the district court decision concerning the direct subject matter of its jurisdictional grant is erroneous. Moreover, the government ignores the numerous cases that hold that government access to documents does not moot an appeal because of the availability of effective relief through return of all copies of the tapes in the possession of the government, as petitioner has requested. Rather than confront this key issue, the government argues that it would be

"premature" to "suppress" the government's introduction of the tapes in a subsequent proceeding, which is merely one possible form of relief, and which petitioner has not sought. The government further ignores or distorts the clear holding of numerous cases that disclosure of documents to the government or compliance with an enforcement order does not moot an appeal because, in addition to return of the documents, the courts may order no further use or disclosure of the documents in an ongoing investigation. Finally, the government's superficial response to petitioner's explanation that *disinterested* third party compliance with a summons enforcement order does not moot the *taxpayer's* appeal distorts the case law and fails to address the relevant principles of mootness doctrine.

I. THE EXTENT OF THE JURISDICTIONAL GRANT OF 26 U.S.C. §§ 7402(b), 7604(a), DOES NOT DETERMINE WHETHER A POST-COMPLIANCE APPEAL OF AN ERRONEOUS SUMMONS ENFORCEMENT ORDER IS MOOT

The core of the government's argument is that the subject matter jurisdiction of the district courts under 26 U.S.C. §§ 7402(b), 7604(a)[1/] is limited to determining whether to compel production of the requested information. Brief For the United States at 8, 11-12, 15-17 (hereinafter "Gov. Br. at _____").[2/] From this unremarkable proposition, the government leaps to the *non sequitur* that, once the district court issues an enforcement order, however erroneous, and once a disinterested third party complies with that order, the case or controversy between the government and the taxpayer comes to an end. Gov. Br. at 12, 15-18. The government, however, fails to

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1/ The government also cites 26 U.S.C. § 7426(b), Gov. Br. at 11, but that section is irrelevant to this case.

2/ The government's lengthy recitation of the summons enforcement procedure, Gov. Br. at 13-15 & nn. 12-14, 17 n.16, while essentially accurate, does nothing to advance the government's position that this appeal is moot.

provide any explanation or hint as to how it managed to get from the first proposition to the second, other than to cite to those appellate court cases that have routinely and without examination accepted the proposition that compliance with a summons enforcement order moots an appeal. Gov. Br. at 12 & n.11; *see* Brief for the Petitioner at 35-40 (hereinafter "Pet. Br. at __") (detailing the development of the "majority" rule that compliance moots an appeal of a summons enforcement order).

The statement that the district courts "lack power to decide questions that are unrelated to the subject matter of the action upon which their jurisdiction is founded," Gov. Br. at 11; *see* Gov. Br. at 15, also does nothing to advance the government's position in this case, because the question decided by the district court here is *directly* related to the subject matter of the proceeding, *i.e.*, whether the summons should be enforced. Petitioner seeks to have the court of appeals rule only on precisely that subject matter -- *i.e.*, whether the district court erred in enforcing the summons. As long as the court may grant petitioner effective relief should petitioner prevail, the case is not moot. Pet. Br. at 14-16. Such relief is readily available through return of all copies of the tapes, no further disclosures, and no further use of them in the alleged investigation. Pet. Br. at 17-26.

The government erroneously relies on cases in which the taxpayer brings an affirmative suit seeking injunctive relief against the IRS, Gov. Br. at 15-16 (citing *Reisman* v. *Caplin*, 375 U.S. 440, 441-43 (1964); *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1278-79 (7th Cir. 1984)),[3/] or in which

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3/ The government's discussion of the sovereign immunity of the United States, Gov. Br. at 11, is completely irrelevant to this case, in which the United States has brought suit against the Church; the Church has not sued the United States. For the same reason, the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), Gov. Br. at 16 n.15, has no application to this case. The Act, by its clear language, does not apply in circumstances, such as here, in which the *government* has brought suit, and the taxpayer merely defends itself. In appreciation of this fact, the government invokes the Act only in support of its discussion that the district court's jurisdiction is limited under sections 7402(b) and 7604(a); it does not argue that

the taxpayer seeks relief in a summons enforcement proceeding that is wholly unrelated to whether the summons should be enforced, *see* Gov. Br. at 15 (citing *United States* v. *Abrahams*, 905 F.2d 1276, 1286-87 (9th Cir. 1990) (refusing to enjoin IRS from interviewing attorney's clients), *United States* v. *Barrett*, 837 F.2d 1341, 1350 (5th Cir. 1988) (refusing to impose conditions on IRS access to summoned documents), *cert. denied*, 492 U.S. 926 (1989)).[4/] Such cases are inapposite to the issues raised in this government-initiated proceeding -- whether the IRS summons should have been enforced, and if not, whether the court of appeals may grant effective relief to the Church. This issue is at the core of the "subject matter" jurisdiction -- however "limited" the government wishes to characterize it -- that Congress granted to the federal courts.

The government's reliance on *United States* v. *Kis*, 658 F.2d 526, 533 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982), is misplaced for several reasons. First, *Kis* itself suggests that the case would not have been moot had it involved compliance by a disinterested third party. *Id.* at 534; Pet. Br. at 27-28. Second, the Church does not seek the suppression of the tapes in some speculative future proceeding, but rather their return and no use or disclosure *now* in the putative ongoing IRS investigation. Pet.

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the Act itself precludes the relief the Church is seeking in its defensive posture. In *First Family Mortgage Corp.*, for example, the court held only that the Act barred a taxpayer from bringing an affirmative action to enjoin IRS use of documents it had obtained in a previously dismissed summons enforcement proceeding in which the taxpayer had failed to intervene prior to the IRS having obtained the documents and the dismissal of the proceeding. 739 F.2d at 1278-79. Each of the other Anti-Injunction Act cases that the government cites are affirmative taxpayer suits. These decisions have no bearing on the proper outcome in this matter.

4/ *But see United States* v. *Zolin*, 491 U.S. 554, 561 (1989) (affirming by an equally divided vote the district court's imposition of conditions on IRS use of the summoned documents). These conditions remain in effect. *See* Pet. App. 4a, 46a; *see also United States* v. *Rockwell International*, 897 F.2d 1255, 1261 (3d Cir. 1990) ("we find that IRS summonses may be enforced conditionally").

Br. at 35-36. Third, whether cases such as *Kis* were correctly decided is the very issue upon which this Court granted review.

Likewise wholly irrelevant to this case is the government's assertion that "the district court's jurisdiction in a summons enforcement proceeding does not include authority to supervise the summoned material once it has been supplied to the IRS." Gov. Br. at 16; *see id.* at 22, 26-27.[5/] Petitioner, however, has sought no such "continuing jurisdiction" or "supervision by the district courts," Gov. Br. at 26-27, in this appeal; it seeks only appellate review of an erroneous district court order. The IRS has had the tapes for fourteen months and has been free to use them as it sees fit (subject only to the unrelated conditions originally imposed by the district court and upheld by this Court). Such unsupervised use may continue unless and until the Church prevails. The Church seeks only that which the government itself concedes it is entitled -- a determination by the courts "whether [its] objections to the summons are valid." Gov. Br. at 17. The only point of disagreement is whether the Church is entitled to a determination in the court of appeals as well as in the district court. Nothing in Congress' jurisdictional grant suggests that there is to be no appellate review of an erroneous district court enforcement order. Thus, whether or not this post-compliance appeal is moot turns not on the subject matter of Congress' jurisdictional grant, but on traditional principles of mootness -- that there is a live concrete controversy between the parties and that effective relief remains available. *See* Pet. Br. at 11-16. As petitioner has explained, if its objections are valid, then the order of production should be reversed, and the effective relief that the Church seeks should be granted.

Throughout its brief, the government repeats like a mantra its conclusory, unexplained claim that once compliance has occurred, the proceeding is over and any appeal is moot. Repetition, however, does not substitute for explanation. Because petitioner seeks appellate review of a live concrete

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5/ In fact, of course, this Court has upheld just such jurisdiction in this very case. *See Zolin*, 491 U.S. at 561; note 4, *supra*.

controversy directly related to the "subject matter" of a summons enforcement proceeding, and because effective relief is available despite disinterested third party compliance, this appeal is not moot.[6/]

II. EFFECTIVE RELIEF IS AVAILABLE SHOULD THE CHURCH PREVAIL ON THE MERITS

The government erroneously claims that the Church contends that the case is not moot only because the courts can order the IRS to cease "use of" the information that has been produced. Gov. Br. at 18-22. Even assuming the government were correct that this particular relief is unavailable, the government completely ignores the Church's emphatic position that the courts may order *the return* of the documents, which would provide effective, even if not complete, relief. *See* Pet. Br. at 9-

6/ The government's claim that the Church appealed from a nonappealable final judgment of the district court, Gov. Br. at 6 & n.8, 10 n.10, 18-19 nn. 17-18, is difficult to comprehend. The court of appeals did not order the district court to enforce the summons; rather, it remanded with instructions to the district court to "admit the MCCS tapes into evidence, *subject to any objections the party's may make*." Pet. App. 15a (emphasis added). However confused the court of appeals was concerning the case's procedural posture, it clearly contemplated further proceedings *prior* to government access to the documents, including whether the government obtained the partial transcripts lawfully, an issue the court of appeals expressly declined to address, but which it certainly did not preclude the district court from considering. Pet. App. 15a n.2; *see* Pet. Br. at 5-7. The issue whether there remained a legitimate investigatory purpose for the summons, *see United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); 26 U.S.C. § 7602(a), did not arise until *after* the court of appeals remanded for further proceedings, when IRS agents testified in January 1991 that the civil component as well as the criminal component of the investigation had terminated. Pet. Br. at 7. The district court erroneously held that the court of appeals had determined these issues against the Church, albeit *sub silentio*, and refused to consider them, although it acknowledged that the court of appeals had not addressed these issues and that the court of appeals' opinion "may evidence a misunderstanding of what this case was about." Pet. App. 8a; *see id.* 9a-11a; Pet. Br. at 7-8. Thus, the government's contention that the Church seeks to relitigate issues previously decided against it in the court of appeals is simply wrong. In any event, whether the Church ultimately should prevail on the merits is not before this Court.

13, 15-17, 20-25, 28, 34, 38, 40, 42-44; *see United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 422 n.6 (1983) (appeal not moot when court "can grant partial relief"). The government's decision to ignore the availability of this form of effective relief is understandable in light of the numerous cases, cited in Pet. Br. at 17-25, that hold that the availability of effective relief through return of documents after they have been produced to the government prevents an appeal from being moot. *See, e.g., In re Grand Jury Subpoena Dated June 5, 1985 (Doe)*, 825 F.2d 231, 235 (9th Cir. 1987); *Cardwell* v. *Kurtz*, 765 F.2d 776, 779 (9th Cir. 1989); *FTC* v. *Ernstthal*, 607 F.2d 488, 489 (D.C. Cir. 1979); *Casey* v. *FTC*, 578 F.2d 793 (9th Cir. 1978); *FTC* v. *Gibson Products of San Antonio, Inc.*, 569 F.2d 900, 903 (5th Cir. 1978); *Atlantic Richfield Co.* v. *FTC*, 546 F.2d 646, 650 (5th Cir. 1977); *United States* v. *Waltman*, 525 F.2d 371, 373 n.1 (3d Cir. 1975); *FTC* v. *Browning*, 435 F.2d 96, 97-98 (D.C. Cir. 1970).

In the recent decision in *FTC* v. *Invention Submission Corp.*, No. 91-5174 (D.C. Cir. June 2, 1992) (1992 U.S. App. Lexis 12157), the court held, "ISC's compliance [with an FTC subpoena enforcement order] does not moot the controversy. As *the parties* pointed out in their briefs, if the subpoena were improper, the Commission could be ordered *to return responsive materials* and *to destroy any records derived from them*." Slip op. at 4 n.1 (emphasis added).[7/] In *Office of Thrift Supervision* v. *Dobbs*, 931 F.2d 956 (D.C. Cir. 1991), the court, in discussing whether a post-compliance appeal involving the giving of testimony was moot, stated, "In the case of records, a party may challenge a subpoena in an effort to *retrieve records* the government obtained through the subpoena. In such a case there remains a live controversy over the custody of the records." *Id.* at 959 (emphasis added); *see id.* at 958.

The government attempts to rebut the numerous cases holding a post-compliance appeal of an FTC subpoena enforce-

7/ Thus, at the same time the government has been asserting that this appeal is moot, it was conceding that the appeal in *Invention Submission* is not moot for the exact same reason that the Chruch has asserted that its appeal is not moot.

ment order not moot by inventing a spurious distinction between "investigative" and "adjudicative" subpoenas. Gov. Br. at 27-29 & n.25. According to the government, post-compliance appeals of adjudicative subpoenas are not moot, but such appeals of investigative subpoenas are moot. Unfortunately for the government, this distinction has no basis either in the cases or in mootness doctrine. *Invention Submission*, for example, involved an investigative subpoena, as the government concedes, Gov. Br. at 27 n.25, as did *Dobbs*, 931 F.2d at 957.[8/] Similarly, *Casey*, 578 F.2d at 796,[9/] *Atlantic Richfield*, 546 F.2d at 647, and *Browning*, 435 F.2d at 99, all involved investigative subpoenas.

In *Gibson Products*, the court distinguished between adjudicative and investigative subpoenas *solely* in the context of determining which procedural rules should apply in resolving whether the subpoenas were properly issued. 569 F.2d at 904.

8/ The government is wrong that the court in *Dobbs* drew a distinction between adjudicative and investigative subpoenas or that it noted such a distinction in *Gibson Products*, *supra*. Gov. Br. at 28 n.25. In fact, the court in *Dobbs* stated that it found no reason to distinguish "administrative" from "litigation" subpoenas for purposes of mootness. 931 F.2d at 959. The only distinction recognized in *Dobbs* was between the giving of testimony, which *Dobbs* held made an appeal moot, and the production of records. As noted, *Dobbs* recognized that post-compliance appeals involving records were *not* moot because the records could be ordered to be returned. *Id*. at 958-59.

9/ Contrary to the government's claim, Gov. Br. at 29 n.27, the court found the appeal in *Casey* was not moot because "we may yet afford the Union relief by preventing further disclosure or by requiring the FTC *to return records* wrongfully subpoenaed." 578 F.2d at 796 (emphasis added). As a wholly *separate* ground, the court found that the absence of verification of the authenticity of the documents also "suggest[s] that there still exists a controversy." *Id*. Thus, the government's suggestion that the case would have been moot had the documents been verified is wrong. Moreover, in *Casey*, the court could not have "reject[ed] the established rule" of the Ninth Circuit that post-compliance appeals of IRS summons enforcement orders are moot, Gov. Br. at 29 n. 27, because the *only* two Ninth Circuit cases on this issue were decided *after Casey*. *See United States* v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710 (9th Cir. 1981); *United States* v. *Kersting*, 891 F.2d 1407 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 49 (1990).

This distinction in no way related to the court's prior holding that the appeal was not moot. *Id*. at 903. Indeed, the two cases cited by the court for this holding -- *Browning* and *Atlantic Richfield* -- involved *investigative* subpoenas. The court in *Gibson Products* explicitly found, as a sufficient and independent ground, that the case was not moot because the court could enter "an order requiring the FTC to return the subpoenaed documents." 569 F.2d at 903. No case has drawn the distinction imagined by the government between adjudicative and investigative subpoenas for purposes of mootness analysis. Resort to this nonexistent distinction does nothing but reveal the weakness of the government's claim that no effective relief can be granted petitioner and that this appeal is moot.

The effectiveness of ordering the government to return the tapes is proven by this very case, in which the government has twice previously been ordered to return its copies of the tapes, which it has done without any claim that its prior possessions rendered the case moot. Pet. Br. at 3-4, 6-7, 15-16. The government responds that its prior possessions did not moot the controversy because the government "returned the records to the district court without inspecting or making or keeping a copy of them." Gov. Br. at 5-6 n.7. Even assuming that, were this statement factually correct, these facts would somehow make a difference in terms of mootness analysis, on both occasions the government *did* make copies and inspect the tapes. Thus, both the district court and the state court orders that granted the government access to the tapes in January 1991 ordered the government to *inspect* and *copy* the tapes. *See* E.R. 41[10/] (Order on Remand, at 2 (C.D. Cal. Jan 17, 1991) ("respondent shall produce the original MCCS tapes . . . to [AUSA Robbins] for *inspection and copying*") (emphasis added)); E.R. 43 (Order to Unseal And Produce Exhibit Pursuant to Order on Remand, at 2, in *Church of Scientology of California* v. *Armstrong*, No. C420153 (Cal. Sup. Ct. Jan. 23, 1991) ("The Clerk of this court

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10/ "E.R." refers to Appellant's Excerpts of Record filed by the Church in the court of appeals.

shall produce Defendant's Exhibit 500-CCCCC (Folder containing two cassette tapes), under seal, for *inspection and copying* by [AUSA Robbins]") (emphasis added)); E.R. 75, item 77 (Government Notice of Lodging Items Under Seal, filed March 14, 1991 (returning to district court: "1. Seven sets of the MCCS tapes consisting of two cassette tapes in each set. 2. One computer disk. 3. One transcript.")). In its petition instituting this proceeding in January 1985, the government admitted that in November 1984 the state court clerk "had allowed the IRS agents *to inspect and copy* Exhibit 500-CCCCC, known as the 'MCCS tapes.'" E.R. 3, ¶ 7 (emphasis added); *see also* E.R. 72, unnumbered item (Reporter's Transcript of Proceedings of April 29, 1985, at 33-35). And relief in which the government does not keep a copy of the tapes is precisely the effective relief that petitioner seeks and which the district court has already twice ordered. Thus, an order requiring return of the tapes now would be identical to the two previous orders that the tapes be returned, which the government has conceded "reinstituted" "the controversy." Gov. Br. at 6 n.7.

The cases also reveal that the Church is entitled to a prohibition against further disclosure of the tapes should it prevail on the merits. In *Sells, supra*, this Court held that disclosure of grand jury documents to Justice Department Civil Division attorneys, pursuant to the terms of a district court order, did not moot an appeal of that order because "we can grant partial relief by preventing further disclosure." 463 U.S. at 422 n.6; *see* Pet. Br. at 18-19. The government's claim that *Sells* and *Doe, supra*, 825 F.2d 231, are inapplicable because they are grand jury, rather than summons enforcement, cases, Gov. Br. at 24-26, misses the point of these cases as it relates to mootness doctrine. The government continues to misconstrue *Sells* as involving "improper disclosures" by "offending officials," and that the appellate courts acted in their "supervisory" authority over "violations" of the grand jury process. Gov. Br. at 24-25; *see* Pet. Br. at 20 n.7. In *Sells*, however, there was no allegation that government officials were acting other than pursuant to an explicit district court order. Indeed, two years after the disclosures, there was nothing but speculative allegations that future

disclosures would occur. The *only* issue in that case was whether that disclosure order was in error, and if so, whether effective relief could be granted by the appellate court. Pet. Br. at 20 n.7; 463 U.S. at 422 n. 6.

Just as nothing in the mootness inquiry in *Sells* turned on the supervisory authority of the federal courts over "prosecutorial conduct," Gov. Br. at 25, petitioner here in no way seeks to have the courts "supervise" the IRS in this matter. Nor, as in *Sells*, must there be a certainty of future disclosures. The *only* issue is whether the district court's enforcement order was erroneous and, if so, whether the federal courts have the power at least to "grant partial relief." 463 U.S. at 422 n.6. As *Sells* makes clear, the federal courts clearly have that power. *See also United States* v. *Fischbach and Moore, Inc.*, 776 F.2d 839, 841 n.2 (9th Cir. 1985); *Casey, supra*, 578 F.2d at 796; Pet. Br. at 20-22.

The two cases the government cites for the erroneous proposition that disclosure to authorized persons, absent allegations of improper future disclosures, moots the controversy, Gov. Br. at 25, do not support the government's position. In *In re Grand Jury Investigation (McElroy)*, 718 F.2d 875 (8th Cir. 1983), the court found the appeal moot *not* because the disclosure had already occurred, but because the transcript at issue had already been returned to the district court, the state prosecutor had retained no copies, had initiated no criminal proceedings, and the government represented it would make no further use of the transcript absent a new court order. *Id.* at 876. Were the government to take each of these steps in *this* case, petitioner would then concede that its appeal is also moot.

Similarly, in *In re Corrugated Container Grand Jury*, 659 F.2d 1330 (5th Cir. 1981), the court held the appeal moot because "there can be *no further dissemination* of the transcripts" pursuant to the district court's order. *Id.* at 1331 (emphasis added). Here, however, the government retains the tapes, is free to continue to engage in future dissemination and disclosures in the course of its purported investigation, and has made no representation that it will not engage in such disclosures. The possibility of future disclosure here is no more speculative

than in *Sells*. Because the federal courts may order return of the tapes and no future disclosure of them if the district court's enforcement order was in error, this case is not moot. *Sells*, 463 U.S. at 422 n.6; Pet. Br. at 16-25.

In addition to requiring return of all copies of the tapes, and no further disclosure of them, the court may also order the IRS to make no further use of the tapes in its alleged ongoing investigation. The government's discussion of this issue is based on the faulty assertion that petitioner's defense of this proceeding constitutes a "premature" suppression motion concerning admission of evidence in a future proceeding. Gov. Br. at 18-22. A suppresion motion in a subsequent trial, however, is merely one form of possible relief. Its potential availability does not foreclose the relief petitioner seeks now, which is directed at the government's *present* retention and use of the documents in its putative ongoing investigation. If petitioner ultimately prevails, surely there is no injustice in preventing ongoing use of documents to which the courts have determined the IRS has no right. Pet. Br. at 35-36, 40-44. Thus, although *Gluck* v. *United States*, 771 F.2d 750, 754 (3d Cir. 1985), *United States* v. *Friedman*, 532 F.2d 928, 931 (3d Cir. 1976), and *Waltman*, *supra*, represent a minority view with regard to IRS summons enforcement cases, they are consistent with other cases that recognize that the availability of an order prohibiting further use of documents in an investigation prevents a post-compliance appeal from being moot. Pet. Br. at 17-18.[11/]

11/ The government's reliance on Judge Garth's dissent in *Gluck*, 771 F.2d at 759, 760 n.2, in which the judge rejects granting relief from the government's present possession and use of documents, is misplaced. Gov. Br. at 23, 32. Judge Garth is incorrect that the *act* of compliance renders an enforcement case moot. As the majority explained in *Gluck*, in a case such as *Vesco* v. *SEC*, 462 F.2d 1350, 1351 (3d Cir. 1972), it was the very act of disclosing the documents that gave rise to irreversible, irremediable harm to Vesco -- criminal liability under Swiss bank secrecy law. *See Gluck*, 771 F.2d at 754; Pet. Br. at 17. By contrast, the harm caused by the act of compliance in a typical summons enforcement case, such as here, can be undone at least partially by granting the relief requested by petitioner and which has been granted in the numerous decisions discussed herein and in Pet. Br. at 17-25.

In *Gibson Products*, for example, the court held the appeal not moot because it could order both return of the documents and "forbid use of the material in the adjudicatory hearing." 569 F.2d at 903. Although the *existence* of a hearing was not speculative in *Gibson Products*, whether the FTC in fact would have sought to introduce the documents into that hearing was no more certain than whether the IRS will seek to use these tapes in a future proceeding against the Church, the government's contrary assertion notwithstanding, Gov. Br. at 27-29. Had the FTC sought to introduce the materials, a suppression motion would have been just as available to Gibson Products as a suppression motion would be available to the Church. Yet, despite the potential availability of such a motion, the court in *Gibson Products* held the appeal not moot.

G.M. Leasing Corp. v. *United States*, 429 U.S. 338 (1977), upon which the government so heavily relies, Gov. Br. at 8, 18, 26, in fact supports petitioner's position. The petitioner therein had instituted an affirmative suit in which it sought relief from an illegal search and seizure, including return of documents, destruction of photocopies, and suppression of all derivative evidence obtained from the seized documents. *Id.* at 346. The district court ordered the return of the records and destruction of the photocopies "because *any use* of them would be illegal." *Id.* at 348 (emphasis added). In its discussion of the appropriate remedy, this Court noted that, pursuant to the district court's order, "the books and records *were returned*, and the photographs concededly have been destroyed [by the government]; that claim, thus, is moot." *Id.* at 359 (emphasis added). Nothing in this Court's decision called into question the propriety of that relief. This Court held only that "the suppression issue" involving the evidentiary fruits obtained from the seized documents should await a proceeding in which the government seeks to introduce *that* evidence. *Id.* at 359. At the least, *G.M. Leasing Corp.* endorses the authority of the courts to grant a party relief by preventing use in an ongoing investigation of documents to

which the government is determined not to be entitled. *Id.* at 348, 359.[12/]

The government asserts that it is "speculative" whether it will make any use of the tapes. Gov. Br. at 29. If the IRS, however, has no intent to use the tapes to determine whether to initiate a civil fraud action, then it is impossible to understand what right it had to the tapes in the first place, pursuant to *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). Moreover, the court of appeals in *Sells* rejected this precise argument "that any challenge to use of the material is premature. . . . This action is a proper means to prevent future disclosure before it occurs; the availability of a motion to suppress in future civil proceedings provides a remedy for improper disclosures that have already occurred." *In re Grand Jury Investigation No.* 78-184 (*Sells, Inc.*), 642 F.2d 1184, 1188 (9th Cir. 1981), *aff'd*, 463 U.S. at 422 n.6; Pet. Br. at 41. As the cases make clear, the potential availability of a suppression motion in a subsequent proceeding is merely one form of relief; it does not preclude petitioner's right to immediate relief should it prevail on the merits of the summons enforcement proceeding.

In *Donaldson* v. *United States*, 400 U.S. 517 (1971), for example, this Court did not hold that suppression "in any subsequent trial" was the *only* remedy available to a taxpayer in a third party summons enforcement proceeding. *Id.* at 531. Rather, it held only that the availability of such a remedy was sufficient to deny a taxpayer an absolute right to intervene in a third party IRS summons enforcement proceeding. *Id.* Congress, of course, by its enactment of 26 U.S.C. § 7609, modified this aspect of *Donaldson*. Had *Donaldson* held that suppression in a subsequent trial was the *only* remedy that the courts had jurisdiction to grant to an intervening taxpayer, as the government implies, Gov. Br. at 18, 30, then, presumably, Congress

12/ The government's reliance on *United States* v. *Blue*, 384 U.S. 251, 255 (1966), Gov. Br. at 19, is particularly perplexing. In *Blue*, the Court merely rejected the argument that a Fifth Amendment violation mandated dismissal of the indictment, rather than the standard remedy of suppression of the tainted evidence.

would have lacked the power under Article III to legislate an absolute right of taxpayer intervention in section 7609. As the cases show, and as Congress recognized in enacting section 7609, present retention, disclosure and use of information by the government in an ongoing investigation are themselves very real harms suffered by the taxpayer. Pet. Br. at 32-34, 41-44. The potential availability of a suppression motion in a subsequent proceeding is unresponsive to these present harms.

The government's "policy" arguments based on the asserted need for expeditious government access to summoned documents, Gov. Br. at 20-22, also have no relevance to a determination whether this appeal is moot. Furthermore, as petitioner has explained, nothing in a post-compliance appellate court review of a district court enforcement order interferes with or delays an IRS investigation, until and unless the district court order is held to be in error. Pet. Br. at 32-34, 41-44. In that event, it is difficult to comprehend the injustice in ordering that the IRS return and make no further use of the erroneously enforced documents.[13/]

13/ The government's accusation that petitioner has attempted to delay this investigation, Gov. Br. at 21, is both false and inappropriate. Petitioner asserted in good-faith an attorney-client privilege, upon which it prevailed in the district court, the court of appeals panel, and the *en banc* court, Pet. App. at 16a-46a. This Court rejected both the government's and the court of appeal's position, and adopted essentially the position of the district court and the three *en banc* dissenters, under which petitioner had also prevailed. *Zolin*, 491 U.S. at 571-72; Pet. App. 19a-26a, 45a. On remand, the court of appeals ignored the factfindings of the district court and the decision of the three Ninth Circuit judges who had reviewed the same evidence and found the tapes protected by the privilege. Pet. App. 13a-15a. The government apparently takes the position that *any* good faith assertion of a taxpayer's rights in a summons enforcement proceeding constitutes an improper attempt to "delay" an investigation. Fortunately, Congress has explicitly rejected this view. *See* 26 U.S.C. §§ 7402(b), 7604(a), 7609.

III. DISINTERESTED THIRD PARTY COMPLIANCE WITH A SUMMONS ENFORCEMENT ORDER DOES NOT MOOT A TAXPAYER'S APPEAL

The government once again misses the point in its superficial response to petitioner's explanation that, even if a *taxpayer's* compliance moots *his* appeal of a summons enforcement order, compliance by a *disinterested* third party does not moot the *taxpayer's* appeal. Pet. Br. at 25-34; Gov. Br. at 29-32. Inexplicably, the government asserts that petitioner contends that the decisions holding post-compliance appeals moot involve only taxpayer compliance. Gov. Br. at 30. In fact, petitioner acknowledged that eighteen (18) of 28 reported cases so holding involved disinterested third parties. Pet. Br. at 35; *id.* at 37-40. Indeed, the petition for certiorari, at 14-15, 19, explicitly noted the conflict in the circuits on precisely this issue, and acknowledged that only the Third Circuit had expressly adopted petitioner's position. *See* Pet. Br. at 18 n.6, 41. Thus, the government's mere recitation of cases that hold a taxpayer's appeal moot following disinterested third party compliance hardly advances the proper resolution of this matter. As petitioner has shown, these disinterested third party cases contain little or no analysis, are unreflectively derived from cases involving *taxpayer* compliance, and fail to address the issue of the availability of present effective relief. *See* Pet. Br. at 35-40.

A fundamental fallacy in the government's reasoning is revealed in the statement that the decisions which hold a taxpayer's appeal moot following disinterested third party compliance "rest on the same rationale underlying this Court's holding in *Donaldson*, that the taxpayer lacks sufficient interest to be allowed to intervene in a summons enforcement proceeding seeking records from a third party because the taxpayer's claims may be made in due course . . . in any subsequent trial." Gov. Br. at 30 (internal quotations and footnote omitted). Congress, however, modified *Donaldson* when it enacted 26 U.S.C. § 7609, precisely because Congress believed that a taxpayer has such a strong interest in a third party summons enforcement proceeding that his claims should not have to await

resolution in "due course . . . in any subsequent trial." *See* Pet. Br. at 32-34, 41-44. Thus, Congress has explicitly rejected the government's rationale for affirming those cases that hold a post-compliance taxpayer appeal moot following disinterested third party compliance.

In addition to the explicit holdings of the Third Circuit cases, petitioner noted that four other cases (not two, as the government asserts, Gov. Br. at 30), involving taxpayer or other interested party compliance, have indicated, without expressly so holding, that there is a distinction in cases involving *disinterested* third party compliance. *See* Pet. Br. at 26-29; *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720, 723-24 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980); *United States* v. *Kersting*, 891 F.2d 1407, 1411 n.9 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 49 (1990); *Kis*, 568 F.2d at 534; *Baldridge* v. *United States*, 406 F.2d 526, 527 (5th Cir. 1969) (Aldrich, C.J., dubitante).

The government chooses to ignore these courts' discussion of this distinction. Thus, it recites the holding of *Arthur Andersen*, *supra*, involving *interested* third party compliance, Gov. Br. at 31, but it acts as if that court never stated, "It would be unreasonable to expect individuals with no strong interest in resisting the subpoenas to expose themselves to contempt by refusing to comply" in order to preserve the issues for appeal. 623 F.2d at 723-24. Similarly, the government refuses to acknowledge that *Kersting* concurred in the distinction recognized in *Arthur Andersen*. *See* 891 F.2d at 1411 n. 9.

The government also incorrectly claims that petitioner is seeking some sort of exception to an otherwise moot case based on "compelling circumstances." Gov. Br. at 31 n.29. As petitioner has explained, it does not seek an *exception* to the mootness doctrine based on equity or reasonableness, but rather it seeks a holding that disinterested third party compliance does not remove the "concrete interest in the outcome of the litigation," *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 571 (1984), between the taxpayer and the government. Pet. Br. at 30-31. The question for this Court is not whether there should be an "exception" to the mootness doctrine, but rather

whether a proceeding *is* moot when there remains a live, concrete controversy between *the parties* and effective relief may be granted. The hypothetical availability of some future proceeding upon which the government places so much weight, Gov. Br. at 18-23, 26-32, is simply irrelevant to resolution of the present, concrete controversy -- whether the district court erred in ordering production of the summoned documents, and if so, whether effective relief may be granted.

CONCLUSION

For the reasons stated herein and in the Brief for the Petitioner, the judgment of the court of appeals should be reversed, and the matter should be remanded for resolution of the issues raised in the Church's appeal.

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Respectfully submitted,

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